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Vol. VII

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 267

SIX COMPANIES OF CALIFORNIA, HARTFORD
ACCIDENT AND INDEMNITY COMPANY, ET AL.,
PETITIONERS,

vs.

JOINT HIGHWAY DISTRICT No. 13 OF THE STATE
OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 22, 1940.

CERTIORARI GRANTED OCTOBER 14, 1940.

No. 9113

United States

Circuit Court of Appeals

For the Ninth Circuit.

SIX COMPANIES OF CALIFORNIA, a corporation, and
HARTFORD ACCIDENT AND INDEMNITY COMPANY,
a corporation, FIDELITY AND DEPOSIT COMPANY
OF MARYLAND, a corporation, THE AETNA CAS-
UALTY AND SURETY COMPANY, a corporation, IN-
DEMNITY INSURANCE COMPANY OF NORTH
AMERICA, a corporation, AMERICAN SURETY COM-
PANY OF NEW YORK, a corporation, MARYLAND
CASUALTY COMPANY, a corporation, UNITED
STATES FIDELITY AND GUARANTY COMPANY, a
corporation, THE FIDELITY AND CASUALTY COM-
PANY OF NEW YORK, a corporation, GLENS FALLS
INDEMNITY COMPANY, a corporation, STANDARD
SURETY AND CASUALTY COMPANY OF NEW YORK,
a corporation, STANDARD ACCIDENT INSURANCE
COMPANY, a corporation, MASSACHUSETTS BOND-
ING AND INSURANCE COMPANY, a corporation, CON-
TINENTAL CASUALTY COMPANY, a corporation, and
NEW AMSTERDAM CASUALTY COMPANY, a corpo-
ration,

Appellants,

vs.

JOINT HIGHWAY DISTRICT NO. 13 OF THE STATE OF
CALIFORNIA, a public corporation,

Appellee.

Transcript of Record

In Eight Volumes

VOLUME VII

Pages 2369 to 2611

Upon Appeal from the District Court of the United
States for the Northern District of California,
Southern Division.

WALLACE B. BOGGS,

called by the defendants; sworn.

Direct Examination

Mr. Tinning: Q. Mr. Boggs, when were you appointed District Engineer of Joint Highway District No. 13? A. September, 1932.

Q. Have you continued in that position ever since that date? A. Yes, sir.

Q. Were you present at a conversation at the District office on April 3, 1935, when Mr. DeLancey Smith, Mr. T. M. Price and yourself were the only persons present? A. Yes, sir.

Q. At that time and place, was there any discussion of an extension of time, between yourself and Mr. Smith and Mr. Price? A. No, sir.

Q. Were you present at a conversation at either Mr. DeLancey Smith's office or Mr. Paul Marrin's office in San Francisco on April 10, 1935, at which Mr. Smith or Mr. Marrin and Mr. Boggs and myself were present? A. Yes, sir.

Q. Was there any discussion of an extension of time at that meeting? A. There was.

Q. Who addressed the assembled gathering on behalf of the Six Companies? A. Mr. DeLancey Smith.

Q. In substance and effect, what did Mr. Smith say to you with respect to an extension of time, or any other matters respecting the project? A. Mr. Smith stated that it was probably the intention of the Contractor to present a request for

(Testimony of Wallace B. Boggs.)

an extension of time. I told Mr. Smith, at that time, that I did not think it was a proper time to present such a request, and, further, I knew of no reasons [1922] why the Contractor should be granted any extension of time.

Q. Was there any discussion of engineering at that meeting?

A. Yes. Mr. Smith brought up the matter of engineering, which had been the subject of some discussion prior to that time, and asked me what my thoughts were on that matter. I told him that that had been ruled upon before, and that my decision was still "No."

Q. Did you have any conversation with Mr. Smith at your office on April 15th or 16th, 1935?

A. No, sir.

Q. Did you have a conversation at any other place, in addition to your office, on or about April 15th or 16th, 1935?

A. No, sir.

Q. Were you present at a conversation held near the west portal of the tunnel on May 21, 1935, at which Professor Derleth, yourself, Mr. S. D. Bechtel and Mr. T. M. Price were present?

A. Yes, sir.

Q. At that time, what, if anything, was said with respect to an extension of time? Please give us, in substance and effect, what was said.

A. Mr. Steve Bechtel—

(Testimony of Wallace B. Boggs.)

Q. Mr. Boggs, in fairness, I think I should first state: you have heard Professor Derleth testify. It is true, is it not, that, before any discussion of extension of time came up, Professor Derleth had left the conference? A. Yes.

Q. Will you proceed with respect to discussing the conversation stating, in substance and effect what was said by the persons present,—Mr. Bechtel, Mr. Price and yourself,—at that time and place?

A. Mr. Steve Bechtel told me that he felt it was necessary for the Contractor to apply at this time for an extension of time. He stated that they were behind schedule and that he wanted to place an application for an extension of time before the District. I told Mr. Bechtel that I considered the placing of any request for an extension of time before the District at that time,—which was a year before the date of completion,—as being entirely premature, and, further, [1923] that I knew of no reason why the Contractor should have such an extension of time as that; I believed that I would recommend against it, if the Contractor filed such a report.

Q. What did Mr. Bechtel say to that?

A. Mr. Bechtel stated that he considered it necessary to apply at this time, at least to get the matter on record before the District.

Q. Do you recall a conversation between Mr. S. D. Bechtel, Mr. Kenneth Bechtel and yourself that occurred at the west portal,—at or near the west portal of the tunnel, a few days after Six Com-

(Testimony of Wallace B. Boggs.)

panies had submitted its request for an extension of time on June 10, 1935? A. Yes.

Q. Do you know the date of that conversation?

A. No; I do not.

Q. What was said at that conversation? Describe the circumstances under which it was held.

A. I met Mr. Kenneth Bechtel and Mr. Steve Bechtel near the west portal of the tunnel; I believe they were coming out of the tunnel, and I was on my way in to make an inspection; Mr. Kenneth Bechtel asked me if action had been taken upon their request for an extension of time; and I replied, in substance, that the request for an extension which had been filed a few days before was somewhat embarrassing to me.

Q. Did you have a conversation on November 19, 1935, in the office of Six Companies near the west portal of the tunnel, at which were present Mr. S. D. Bechtel, Mr. V. G. Hindmarsh, Mr. DeLancey Smith and yourself? A. Yes, sir.

Q. Will you state, in substance and effect, what was said at that conversation?

A. Well, that was a rather long conference, and there were quite a few matters discussed. I had been up into the tunnels, and, returning to my field office, I found a message there that Mr. Hindmarsh would like to see me at the Six Companies office,—their field office at the west portal. I went to the office, and [1924] I found there, in addition to Mr. Hindmarsh, Mr. DeLancey Smith and Mr. Steve

(Testimony of Wallace B. Boggs.)

Bechtel. Mr. Smith asked me what action had been taken upon their application for a 48-hour week for the employment of labor in the tunnel. I told Mr. Smith that the matter had been approved by the Bureau of Roads at some short time in the past, and that I had advised Mr. Price by telephone as to that action. Mr. Smith asked me if I would furnish a letter to the Six Companies advising them to that effect, which I told him I would do. There was then some discussion as to when this 48-hour week permit expired. I might say that, at that time, the Contractor was approximately at the end of the work for which that permit had been granted.

Q. That was the emergency work?

A. That was the emergency work.

Q. Catching up the cave-in of August 28th?

A. And catching up to the face of the excavation before new excavation could proceed.

Q. That is, catching up the concrete,—bringing it up?

A. Yes. This subject was discussed generally, and it was agreed that the Contractor would go back to the 40-hour week in the south tunnel, which was caught up, or would be caught up within a few days, and that, as soon as the north tunnel had reached some designated point, that they would then go back to the 40-hour week in that tunnel.

There was some further discussion as to the classes of employees coming under this designation of the 40-hour week which had been granted

(Testimony of Wallace B. Boggs.)

about a year before, and it was agreed that Mr. Bechtel, or that the Six Companies, at least, would write a letter to me designating just which employees were to be carried upon the 40-hour week as distinguished from the 30-hour week which applied to the outside work, and that I would submit that list to Mr. Sweetser of the United States Bureau of Roads, who represented the PWA, for his approval. [1925]

Mr. DeLancey Smith then brought up the matter of an extension of time, stating that the Contractor felt he should apply again for an extension of time; he said to me that he understood that, at the time the previous application was made, I had given as a reason for rejecting the same that the application was premature and asked me if I was still of the same opinion. I told him yes, and, further, that any new application which was submitted would have to be approved by the PWA, and should carry again a sufficient reason for any extension. Mr. Smith then asked me if I did not consider that the Contractor's difficulties experienced in driving the tunnel, the cave-in, the wet weather of the previous winter, might not change my opinion. I told him no, I did not consider that any of those matters were reasons for an extension of time for the Contractor. Mr. Smith said that he understood that that was my technical position, but perhaps that my position in this matter might be changed. I told

(Testimony of Wallace B. Boggs.)

Mr. Smith that I knew of no reason for granting an extension of time to the Contractor at that time.

Following that discussion—No; to go back; I also told Mr. Smith that inasmuch as the Contractor was behind again on the schedule which he had submitted in February, and I had in mind writing a letter requesting a new schedule, Mr. Bechtel, I believe it was, said that they would submit such a schedule shortly after the first of the year.

The Court: Q. That would be the third schedule?

A. That would be the third schedule, yes. They wanted to wait until that time because Mr. Hindmarsh, who was then superintendent of the work, had not performed any driving operations of the main tunnel, and they wanted to see what progress he could make.

Mr. Bechtel also said that they would like to submit their [1926] request for an extension of time at the time they submitted that schedule, and he asked me if I could not help them in preparing such a schedule and in thinking up some reasons which would not be controversial, by which I could possibly recommend an extension. I told him that I thought they had sufficient brains in their organization to think up their reasons, but that I would be very glad to cooperate in any way that I could.

There was then some discussion of actual construction problems, which I suggested Mr. Hind-

(Testimony of Wallace B. Boggs.)

marsh, the superintendent, take up with Mr. Gelston, the resident engineer, upon the work.

The Court: We will take a recess for five minutes.

(After Recess)

Mr. Tinning: Q. Had you concluded your discussion respecting the conference and conversation of November 19, 1935, Mr. Boggs?

A. No. There were a few other matters that were discussed. I asked Mr. Bechtel the status of Mr. Hindmarsh and Mr. Price, who had been project manager; and Mr. Bechtel told me that Mr. Price was still project manager but that Mr. Hindmarsh would be in charge of the actual field operations. I asked that a letter be given me so advising me and advising me how I should address my correspondence with the Six Companies. I think it was agreed that I would simply address it to the Six Companies direct, and that they would route their mail as they saw fit.

Following that, I took Mr. Bechtel and Mr. Smith—I drove them down to the train, and, on the way down and while waiting for the train, I asked as to the status of Mr. O. W. Peterson, who had been quite active formerly on the job and had frequently consulted with me. I was told by Mr. Bechtel that Mr. Peterson would continue in a supervisory or consulting capacity. [1927]

Q. Is that the end of the conversation?

(Testimony of Wallace B. Boggs.)

A. Mr. Bechtel told me that the Contractor desired to cooperate in every way to get the job finished as expeditiously as possible and that he hoped, if there were any questions or matters which arose between myself and members of the Contractor's organization, that I would not hesitate to take those matters up with him directly. I think that was practically all of the conversation.

Q. Did you have any conversation at that time, in December, 1935, with Mr. T. M. Price of the Six Companies, in which he discussed with you the question of the Six Companies requiring an extension, or, specifically, as to the grounds therefor, the time required for paving? A. No, sir.

Q. Did you have a conversation on or about January 22, 1936, with Mr. Hindmarsh at your office?

A. Yes.

Q. At that conversation, who was present besides yourself and Mr. Hindmarsh, if anyone?

A. Mr. Barkley, my chief assistant engineer.

Q. Was Mr. Ferneau present at any time while Mr. Hindmarsh was there?

A. Yes; Mr. Ferneau came in during the latter part of the conversation.

Q. Mr. Ferneau—what capacity did he have in this matter?

A. Mr. Ferneau had a somewhat dual capacity in that he represented the United States Bureau of Roads,—that would be the PWA,—as their inspector; and he also represented, or reported to, the

(Testimony of Wallace B. Boggs.)

Department of Public Works of the State of California.

Q. Will you now state what was said, in substance and effect, by Mr. Hindmarsh to yourself and, if Mr. Barkley participated in the conversation, what Mr. Barkley said?

A. Mr. Hindmarsh brought in a draft of a letter submitting a new schedule of operations for an estimated time of completion. It was a time schedule. Also included [1928] in that letter was a request for an extension of time to coincide with the date of completion shown upon the submitted schedule. I told Mr. Hindmarsh it was not in the form which I felt I could give consideration to an extension of time, in that it did not outline any detailed reasons but was substantially a blanket request such as had been submitted in the previous spring, without outlining any detailed reasons, and that I felt that, in order to properly consider—to have an application which I could consider, that they should outline, in detail, the reasons for which they considered they were entitled to such an extension, and that those reasons should set forth both the reasons for delay and also the amount of time upon each of the various reasons for such delay.

Q. Was such a letter, in accordance with your suggestion, later submitted by the Six Companies?

A. No; no such letter was ever submitted.

Q. Was anything more said in that conversation?

(Testimony of Wallace B. Boggs.)

A. Yes. Mr. Hindmarsh said that some of the reasons were the cave-in, the ground difficulties which they had encountered, the rainy weather of the previous winter and of the present winter; and he also asked me if the paving could not be completed due to a late spring—whether that would not be a good reason to put in. I told him that I was not going to pass verbally upon any reasons at this time, in view of the fact that some of my remarks in the past had apparently been misconstrued, and that I did not want to have any misunderstanding of my position; but that any application which was submitted would be carefully and conscientiously considered; and I suggested that he bring such an application in some time in April, prior to the time of the contract's date of completion in May of 1936.

Q. Mr. Boggs, at any time, from the commencement of the work by Six Companies under this contract up to the time that they left the [1929] work on June 13, 1936, did you state to any representative of Six Companies that you thought they were entitled to an extension of time?

A. No, sir; I did not.

Mr. Tinning: You may cross-examine.

Cross Examination

Mr. Marrin: Q. At the conversation which you held with Mr. Hindmarsh, Mr. Barkley and Mr. Ferneau, on January 2, 1936—

A. January 22nd, I think it was.

(Testimony of Wallace B. Boggs.)

Q. —January 22, 1936, you stated that Mr. Ferneau came in later? A. Yes.

Q. I understand, from that, that you and Mr. Hindmarsh and Mr. Barkley were present throughout the conversation? A. Yes.

Q. And Mr. Barkley was in hearing of the conversation? A. Yes.

Q. But Mr. Ferneau did not hear all the conversation?

A. No. I think he heard very little of it, if any.

Q. Did you state, at that time, to Mr. Hindmarsh, that you considered an application which would be made in January, 1936, would be premature, or words to that effect?

A. No. I told him I thought the proper time to put in such an application would be probably in April, shortly before the date of completion of the contract, which was the latter part of May.

Q. You recommended that he withhold filing an application until that time?

A. I did not recommend. I simply told him that I thought that that would be the proper time to put such an application in.

Mr. Marrin: No further questions.

Mr. Tinning: No further questions. [1930]

Mr. Tinning: We now submit our case on the issue of the right of the Contractor to rescind the contract.

Have you gentlemen anything further in testimony?

Mr. Marrin: In rebuttal on this issue?

Mr. Tinning: Yes.

Mr. Marrin: No. [1931]

Mr. Wittschen: The defendant now moves the Court for a judgment in its favor on the issue of the right of the plaintiff to rescind the agreement between plaintiff and defendant dated June 4, 1934, on the ground that the evidence will not support findings in plaintiff's favor and that there is no evidence sufficient to sustain a judgment in favor of the plaintiff on any of the two counts stated in plaintiff's complaint; defendant further moves the court for special findings of fact in accordance with the allegations of its answer in answer to each of the two counts stated in plaintiff's complaint.

Defendant further moves the court for conclusions of law that plaintiff take nothing by count one of the complaint and that plaintiff take nothing by count two of the complaint. Defendant further moves for judgment in favor of defendant separately on count one and separately on count two.

Defendant moves the court separately for judgment in its favor on the issues raised by the second separate and further defense to the first count of plaintiff's complaint, and for judgment in its favor separately for the issues raised by the second separate and further defense to the second count of plaintiff's complaint.

Defendant requests special findings on each and all of the issues raised by count one and count two

of plaintiff's complaint and of the answer of defendant thereto, which findings will hereafter be prepared and presented prior to the conclusion of the trial and will embody not only findings requested on the issue of the right of the plaintiff to rescind but upon each and all of the other issues raised by the pleadings.

Does your Honor care for any argument on that? The Court: If counsel desires to argue it.

Mr. Marrin: I might say, if your Honor please, that this matter [1932] has taken us a little bit by surprise. In other words, the defendant said they would take eight or ten days in their case, and under the Federal procedure I rather take it that this, being a motion for judgment upon one of the issues after the evidence has been taken on both sides, that we should make a motion for judgment, ourselves, in order to make a record. Now, I have not prepared a written motion because I had not anticipated that that matter would come up for about two weeks.

Mr. Wittschen: Mr. Marrin, I did not mean to mislead you, but I think you misunderstood us. We think it will take about eight days to present our cross-complaint evidence if this issue is decided in our favor.

Mr. Marrin: I misunderstood counsel and I did not realize that the matter would reach this point at this time. Now, I can present the motion orally, but I would like the privilege of preparing the motion during the noon hour and submitting that.

Mr. Wittschen: I am frank to say, myself, I do not think this necessary; it is the procedure fol-

lowed, but a very late case has come down reversing the Circuit Court of this Circuit just a little while ago, in which Mr. Alexander was counsel, stating that the case was still open until the Court signed the judgment, and even the direction of findings isn't a conclusion of the trial; but I certainly have no objection to your doing what we have done, and if you wish to make it orally you may do so.

Mr. Marrin: And it is stipulated that a written motion may later be made and substituted for it?

Mr. Wittschen: Yes.

Mr. Marrin: We would like to make a motion for judgment and request findings in order to protect our record.

At this time, if your Honor please, the plaintiff moves the [1933] court for judgment upon the following grounds:

1. That the evidence in this case shows that the defendant failed to make the progress payments when and as due, entitling the plaintiff to rescind the contract.

2. That the retention from the progress payments of the money which was due was a material breach of the contract which entitled the plaintiff to rescind.

3. That the plaintiff was entitled to an extension of time as of right and that the decision of the engineer in this case in denying an extension of time in view of the evidence in the record, was arbitrary, capricious, and wrongful, and that the evidence shows that the amount of the deduction was substantial and material, when coupled with the fact

that it would have amounted to the sum of \$112,000 before the contract had been completed.

The plaintiff also moves for judgment in its favor upon the ground that it was misled in entering into the contract and that the defendant was guilty of representations amounting to fraud, actual or constructive, and further on the ground that the contract was entered into under a mutual mistake of facts as to the ground conditions, and that upon the evidence in this case the plaintiff was entitled to rescind, and is entitled to judgment, for the reasonable value of the work done. And we will, of course, present and request the Court to make special findings.

The Court: Is it now the wish of both sides that the Court rule?

Mr. Wittschen: It is the wish of the defendant.

The Court: Do you want to submit it on the record?

Mr. Wittschen: Yes.

Mr. Marrin: How does your Honor desire to handle it, by oral argument or briefs? [1934]

The Court: As to the procedure, I am of the present state of mind, if it will be helpful, that counsel go forward with his proof, whatever it may be. Unless I change my view, which is subject to change always, I will say there is not sufficient evidence in this record to respond to actual or constructive fraud, and I will so declare unless I am persuaded otherwise. Is that clear?

Mr. Marrin: You say there is not sufficient evidence?

The Court: I so declare now without ruling finally upon it, unless you want argument on it; if you want time to discuss that I will give you time.

Mr. Marrin: I think we should discuss the matter, if your Honor please.

The Court: Very well, proceed and discuss it.

Mr. Wittschen: Whom does your Honor wish to argue?

The Court: The one who has the laboring oar, your opponent.

Mr. Marrin: If your Honor please, this is the situation; I do not think that, and I am frank to admit, that we have shown any intentional misrepresentation in this case. I do think, however, that the record is sufficient to show that there was a situation here in which the facts as they were presented to the plaintiff when it submitted its bid were contrary to the facts as they actually existed.

The Court: It may be helpful, I will offer this suggestion, keeping in mind the evidence and law thus far gone into, where did the District fail to do its duty or measure up to its legal obligation, either on the factual side or the law side? I am saying that in order that it may be helpful.

Mr. Marrin: This is the view we take of it, if your Honor Please, the District in the specifications upon which they asked the contractor to bid, called attention to the geological report. [1935] Now, the apparent contention of the defendant in this case is that the plaintiff should have known, because of all the tunnels which had been built in this area,

that the ground at this point might be bad. However, the defendant apparently felt that it was necessary to make a particular examination of the specific ground at this site, and there is evidence in this record to the effect that the ground conditions in one tunnel, even though it may be only a short distance away, are not controlling of the ground conditions that may exist in another tunnel. The District did make an examination—it caused a geologist to make that—it had a report made, and that report said that for the most part the ground through which the tunnels would be built would be good from an engineering standpoint and would be self-supporting. The District had some purpose in having that report made, and in having that examination made. It had some purpose in drawing that report to the attention of prospective bidders, and while it disclaimed any guarantee of it or any liability for it at the same time it caused the information to be gathered, caused a report to be made and filed in its office, and it drew the attention of the contractor in this case to that report, and it was examined, and the evidence is that it was relied upon. Now, I think that from the specifications in this case the District probably also relied upon that report, although there is no direct evidence of it. The District provided in the specifications for the removal of the timbering and stated that the general intent of the specifications was that all of the timbering would be removed. This was a verification

of the facts which are set forth in this geological report. The District also provided for an A type and a B type of tunnel construction. It also provided for a tunnel which in its design had a very flat arch above the spring line [1936] or wall plate line which would withstand very little pressure from the outside at that point while excavation operations were being carried on. It also provided on the plan for batter posts, which indicated that no underground pressure was expected. These matters, if your Honor please, were representations which were made by the District to the contractor as to the conditions that would be encountered, and on that proposition we feel that if those representations were not true that under the decisions the defendant is responsible for them, notwithstanding any exonerating clauses which it might put in or any statement to the effect that it does not guarantee the representations. It is on that point, if your Honor please, that we feel that the District did make representations which make it responsible for any result.

Now, as to the ground, we have proved, and, as your Honor said, we built the tunnel twice—we have proved, I think without doubt, and it is not questioned, that the ground which was encountered was very different from anything involved in the geological report, diabase dikes, sandstone dikes, crushing, faulting and other conditions were encountered which were not mentioned or even intimated, which caused a great deal of difficulty in the

excavation and made the excavation much slower than it otherwise would have been. There is not any doubt in our mind, at least, that the statements made by Professor Louderback, while possibly not made with any intention to deceive, and we do not charge him with that, perhaps not made by the District with any such intention, we do not charge them with that, but they were nevertheless statements of fact which were contrary to the facts which were actually developed.

Now, it is our position that when the owner makes a statement of fact and the contractor submits a bid in reliance upon that, and that fact develops to be untrue, and it turns out that it injures the contractor, the contractor has a right of action for the [1937] damage which results therefrom; in other words, the owner assumes the liability.

It has been intimated here, and I think Mr. Wittschen stated if they had not disclosed the geological report they would have been liable. I do not agree with that, for the reason if the owner makes no representation at all and has in its possession information which indicates conditions more favorable than actually existed it could not be held liable for any concealment, because it has not concealed anything which would be detrimental to the contractor. But as the Circuit Court of Appeals said in this Circuit in the Sartoris Case, when an owner makes such statements, the owner makes them for a purpose, and the implication is that it is to influence

the bid, and having influenced the bid the owner is responsible for the results thereof.

That, briefly, if your Honor please, is our position with respect to the issue of constructive fraud, or mutual mistake, or whatever it may be, and whether it is constructive fraud or whether it is mutual mistake plaintiff, who is injured, is entitled to rescind on that ground.

The Court: I will say I realize how important a ruling is at this time, and for the reasons I have indicated my state of mind it was so that we would go forward with the trial.

Mr. Marrin: My associates draw my attention to the fact that I did not argue the extension of time ground, but I understood that your Honor wanted the argument simply on the question of the issue of fraud, but I would be glad to argue the other.

The Court: That is a factual situation, is it not?

Mr. Marrin: The extension of time?

The Court: Yes.

Mr. Marrin: Our position on the extension of time, if your [1938] Honor please, is, in the first place, that the engineer——

The Court: Pardon me, I want to be helpful to both sides. I have indicated my present state of mind. We can allow the record to stand and I will give you full opportunity to meet anything you have in mind in any reasonable time.

Mr. Smith: I suggest that we postpone this matter until two p. m. and then we will proceed.

The Court: I will do that, but my thought is to disclose my mind at this time, it would be better to go on with this case. From the standpoint of the record what is the immediate necessity for a ruling?

Mr. Wittschen: There is not any immediate necessity, except that we could not go on with our case, unless you ruled that the right to rescind is not present. Under the ordinary procedure I suppose they would go ahead now and prove their damages in some detail, and we would cross-examine on that report, that is, not on that report, but on that figure they put in evidence; in other words, they really have not concluded their entire case. They have concluded their case on what we think is decisive.

The Court: I was about to declare, both under the facts presented and the law as presented, you have not a right to rescind.

Mr. Smith: We have been here quite a while, and there is quite a bit of evidence that might have escaped our minds, and I think it would be helpful to review the evidence to you.

The Court: I do not want to deprive you of that opportunity.

Mr. Marrin: If I understand Mr. Wittschen's position correctly, it is this, that they have presented all the evidence which they intend to present at this time in defense to the plaintiff's case, with the exception that if we go ahead with our proof on the amount which we may be entitled to recover they, of course, reserve the [1939] right to cross examine and put in counter evidence on that issue.

Mr. Wittschen: That is partly true. I am going further than that. I made a motion earlier in the case and repeated it again in substance that there is no use of spending another week, at least, upon your damages if you have no right to rescind, because then that is immaterial, and that is precisely the way the case was tried, so that if the Court rules that you have no right to rescind I think that we would then try the cross complaint.

The Court: That is my present state of mind. I do not want to dispose of that without giving you a full opportunity to present it.

Mr. Marrin: I feel, if your Honor please, that if this matter is going to get down to an argument on the real merits of this matter that we should have over the week-end, at least, to prepare the argument and present the matter fully. It is very important. I do not quite appreciate Mr. Wittschen's position or the Court's position on the matter.

The Court: To be frank with you, I do not know the method or manner—I do not want to mislead anyone—probably counsel, here, are better acquainted with the situation than even the Court is. I usually meet any matter which is submitted to me after both sides have had a full opportunity to be heard. This case is important, and since I have declared my state of mind I still will leave it open only with the view that I want you to have a full opportunity to present the case.

Mr. Wittschen: What the Court suggests, as I understand it, Mr. Marrin, is this, that its present

state of mind is you have no right to rescind, but that is merely what you might say is a preliminary statement. It is not a ruling.

The Court: It is to arouse you to a great effort, so that if [1940] I am in error you will arouse me to withhold my present state of mind and change it, if possible.

Mr. Marrin: That is what we want to do.

Mr. Wittschen: I did not mean to spring any surprise. I thought that was understood. As you recall, on the first day—

The Court: I suggested, or I think I inquired when we first started in with the proof—I think counsel answered it—what was it you said?

Mr. Smith: I stated to your Honor I thought the case should first be disposed of on the complaint and answer before proceeding any further.

Mr. Wittschen: I do not object to your taking time to consider it until this afternoon or whatever time the Court wants to give you.

Mr. Marrin: It seems to me the matter has arrived at a stage now where the defendant has closed its case and your Honor's decision may entirely and probably will entirely determine the rights of the plaintiff so far as the plaintiff is concerned. Now, this is a long record, if your Honor please, there are some 1,600 or 1,700 pages of transcript. There is a lot of law on the subject, and I had misunderstood Mr. Wittschen's purpose, I thought there would be some two or three more weeks of trial at this time, and it would be my suggestion, in

view of the importance of this matter, to the plaintiff and to the defendant also, in view of our desire to present a complete argument on the law and the facts, that the matter be adjourned for some time and then if the Court decides we are entitled to rescind, I take it that it is useless for the defendant to go ahead with the cross complaint. If the Court decides, on the other hand, that we are not entitled to rescind, then there won't be any issue on the matter of damages, which will save about a week of the Court's time, and it will leave the matter clear for them to go ahead with their cross complaint. [1941]

The Court: Since I have declared in this case that I did not think you were entitled to rescind, with that thought in mind I will give you full opportunity to change my views.

Mr. Wittschen: I have no objection to your Honor giving them time until Tuesday, but as to its going over beyond that I personally am in this position. Miss Phillips, of the United States Attorney's Office, has been in two or three times to see me. The Judge who is coming from Illinois has a case of mine set which is going to take some time to try, and the understanding was that we would try it at the conclusion of this case, because they are bringing an assistant from Washington on it.

The Court: They are bringing one in a case I am to try.

Mr. Tinning: I have one other suggestion, it may not be pertinent, but it is very important, we have a very large force of District men whom the

District will have to hold until the remaining testimony is disposed of. Many of these have work they can go into, and we are having to hold them, and we desire very much to conclude the case.

The Court: That does not impress the Court very much.

Mr. Marrin: We are more or less in the same position.

The Court: Might I inquire, is there any hope of getting together if I dispose of this matter?

Mr. Tinning: We have been so far apart in the amount involved up to this date we have never discussed anything.

(After discussion.)

Could we have this program: Can counsel for plaintiff be ready to go forward on Tuesday, and if they desire to discuss any matters with us this afternoon we will be very glad to devote that time to it.

The Court: I think that will be satisfactory. I will continue the case until Tuesday morning at ten o'clock. [1942]

(The further hearing was thereupon continued until Tuesday, May 31, 1938, at ten o'clock a. m.)

[1943]

Tuesday, May 31, 1938

Mr. Marrin: If your Honor please, at this time I should like to present a motion to strike.

Plaintiff moves to strike from the Record Exhibit "WWW," introduced by the Defendant (Transcript page 804) [page 1409 this printed record], being purported letter of regulations of Federal Emergency Administration of Public Works, containing Administrative Order of Federal Emergency Administration of Public Works Number 54, together with a letter from the Chief of the Bureau of Public Roads transmitting same, and also, a letter from one C. H. Sweetser transmitting same all of said documents having been introduced as one exhibit.

Also, Plaintiff moves to strike from the Record Defendant's Exhibit Number "0-4" (Transcript page 1458) [page 471 Book of Exhibits], being Grant Agreement between the United States of America and Joint Highway District No. 13 for a grant of money to construct the project of the Defendant District.

This motion is made upon the ground that the said exhibits have no relationship of any kind or character to the Plaintiff or to its relations with the Defendant under its contract with the Defendant, and on the ground that there was and is no privity of contract between the Plaintiff and Federal Emergency Administration of Public Works and said exhibits are not binding on Plaintiff, and upon the ground that Plaintiff had no notice of any kind

or character of the existence of any contract between the District and Federal Emergency Administration of Public Works until long after the contract between Plaintiff and Defendant was made; and that for these reasons the said exhibits were and are irrelevant, incompetent and immaterial and tend to prove no issue in the case." I should like to file that.

Mr. Alexander: The cross defendant surety companies make the same motion and upon the same grounds. [1944]

Mr. Wittschen: As far as the two letters are concerned which accompanied the regulations of the Public Works, that order that was promulgated, we only introduced those because counsel said "If you are going to introduce the order you might as well introduce the letter." We have no objection to the letters being stricken, as long as the order of the Department which stated how liquidated damages should be handled remains; in other words, it came to us in the form of a letter to Mr. Sweetser, who was representing them; it was accompanied by another letter, the exact tenor of which I do not now recall, to the effect that this order had been promulgated. We are only concerned with the order.

Mr. Marrin: The letter on its face shows the date on which it was received by the District.

Mr. Wittschen: We received that order before we exacted any penalties.

Mr. Marrin: You received the order in March, I believe, 1936.

Mr. Wittschen: And exacted penalties in June.

Mr. Marrin: Yes.

The Court: I suggest for the purpose of the record that the matter be submitted for determination.

Mr. Wittschen: Very well.

Mr. Marrin: If your Honor please, you recall I made an oral motion for judgment, and I would like to follow it with a formal written motion.

MOTION OF PLAINTIFF

for Special Findings of Fact and Conclusions of Law and for Judgment in its favor.

Plaintiff moves for judgment in its favor for such sum or amount as the Court shall find upon the evidence to be the reasonable value of the work and labor performed and contributed by Plaintiff prior to the date of rescinding the contract on June [1945] 13, 1936, on the following grounds:

I.

That the undisputed evidence in this case establishes substantial breaches of both express and implied conditions of the contract by the Defendant, causing great loss and damage to the Plaintiff in that Defendant failed to make payment to Plaintiff on June 10, 1936, of the money due Plaintiff from Defendant under the contract for work done by Plaintiff during the month of May, 1936, and by deducting from the money due Plaintiff the sum of \$500 per day for each day after May 24, 1936, and thereby declaring its intention to continue to

breach said contract by failing to pay Plaintiff the amount due it under said contract if Plaintiff continued to perform same by further deduction of the sum of \$500 per day until the work under said contract was completed on about the 3rd day of January, 1937, or a total deduction of \$112,000.00, from money justly due Plaintiff under the terms of the contract, to Plaintiff's great injury and damage, thereby justifying its rescission of the contract.

II.

That the undisputed evidence establishes that the Defendant failed and refused to give to Plaintiff any extension of time within which to complete the performance of the work under the contract, and that such refusal was wrongful and illegal because Plaintiff had been unavoidably delayed in the performance of the work under the contract for a period of 300 days, or more, and had also been delayed in the performance of the work under said contract by reason of stormy or inclement weather, and had been delayed by operation of law, and Plaintiff was thereby justified in rescinding the contract. [1946]

III.

That the undisputed evidence in this case establishes a substantial breach by the Defendant of the contract in that the materials through and under which the tunnels were to be constructed were substantially different from those shown, or predicted, or represented in the geological report furnished to bidders, in the plans and specifications furnished to bidders, and in the contract and the specifications

forming a part thereof entered into; and made the performance of the work much more difficult and expensive than it would have been had the materials corresponded with the materials predicted and represented by and in the geological report and the contract, plans and specifications; and thereby the warranty contained in the contract and relied upon by Plaintiff in making same, as to the materials to be found through which the tunnels would be built, was breached to Plaintiff's great injury and damage.

IV.

That the undisputed evidence in this case establishes constructive fraud on the part of the Defendant in inducing Plaintiff to enter into the contract.

V.

That the undisputed evidence in this case establishes capricious and arbitrary conduct by the District Engineer of the Defendant in failing and refusing to determine and adjudge that Plaintiff was unavoidably delayed in the doing and performance of the work.

VI.

That the undisputed evidence in this case establishes that a gross mistake was made by the Engineer of the Defendant District in failing and refusing to determine and adjudge that Plaintiff was unavoidably delayed in the doing and performance of the work.

VII.

That the undisputed evidence in this case establishes that the [1947] Defendant breached the contract by failing and refusing to give Plaintiff proper lines and grades to work to in the construction of the tunnels.

VIII.

That the undisputed evidence in this case establishes that a mutual mistake was made by the Plaintiff and Defendant in entering into the contract in that Plaintiff and Defendant both believed that the ground through which the tunnels would be driven would be of self-supporting character for about 2,000 feet of the length of each of the tunnels; and both parties relied upon this fact in entering into said contract; and in truth and in fact the ground through which said tunnels were driven was entirely nonself-supporting, but required artificial support throughout before and during the lining of the tunnels with concrete to the extent that it was impossible to remove such artificial support, thereby causing Plaintiff great injury and damage.

IX.

That the undisputed evidence in this case establishes that Plaintiff relied upon the information contained in the various documents furnished to it by Defendant prior to bidding, including particularly the geological report, plans, and specifications, and planned the doing of the work covered by the contract in reliance upon the information so furnished that the ground through which the tunnels

would be driven would be found to be self-supporting for the most part; and by reason of the fact that none of said ground was self-supporting, Plaintiff was unable to construct the tunnels in accordance with its plans made in reliance upon the information furnished by the Defendant, thereby causing great injury and damage to Plaintiff.

Plaintiff moves for such judgment upon each of the two counts stated in its complaint and further moves the court for special [1948] findings of fact in accordance with the allegations of Plaintiff's complaint and each count thereof.

Plaintiff further moves the court for conclusions of law that Plaintiff is entitled to judgment on each count of its complaint for the reasonable value of the work and labor performed for, and material furnished to, Defendant under the contract between the parties dated June 4, 1934, and prior to the date of rescinding said contract on June 13, 1936.

Plaintiff requests special findings on each and all of the issues raised by count one and count two of its complaint and the answer thereto, which findings will hereafter be prepared and presented prior to the conclusion of the trial and will embody not only findings requested on the issue of the right of Plaintiff to rescind, but upon each and all of the other issues raised by the pleadings.

Mr. Alexander: I just want to say the cross defendant surety companies make similar motions and upon similar grounds.

Mr. Marrin: If your Honor please, with respect to the findings and the rather technical nature of the proceedings, I suggested the matter to Mr. Wittschen, and I believe we are in agreement—neither one of us wants to cut off any right—I would suggest the following stipulation, if it is agreeable to Mr. Wittschen, that it is stipulated that the trial shall be deemed to continue and be in progress until findings of fact and conclusions of law are presented by the parties and signed and filed by the Judge, as provided by Rule 42 of this Court, and that any opinion or order of the Court previous thereto shall be considered as merely preliminary, and as not terminating the trial, and that the cause shall not be deemed finally submitted for decision until such findings of fact and conclusions of law are so signed and filed by the Judge.

Mr. Wittschen: Except I would like the Court to make an interlocutory [1949] decree. In other words, we do not know how otherwise to proceed. I have no desire to impale one side or the other on any technical finding. We are willing to stipulate that in view of the fact that issues are still open on the cross complaint under my theory, that findings of fact and conclusions of law may be filed at any time after the Court has ruled on the cross complaint, but obviously we could not go ahead on the cross complaint unless the Court should conclude that Plaintiff had no right to rescind. If you have a right to rescind there would not be any cross complaint.

Mr. Marrin: My purpose in that is this. I understand that you desire the Court to make what you call a temporary interlocutory order, and I want to be certain that we are not precluded from thereafter presenting special findings.

Mr. Wittschen: I will so stipulate that you will not be precluded by any order the Court may make.

Mr. Marrin: That is satisfactory. With respect to the cross complaint, I spoke to Mr. Wittschen about this yesterday, and I think that the evidence which has been adduced on the complaint would automatically apply to the cross complaint, but both sides are agreeable that that be done, so that there will be no necessity of reintroducing a lot of evidence here, and I would suggest this stipulation on that, if agreeable, it is stipulated that the entire record already made in this case may be considered as applicable to the trial of the issues on the cross complaint and the answers thereto, as well as the issues on the cross complaint and answers thereto, subject to all motions, objections, and exceptions.

Mr. Wittschen: As I understand, that is agreeable. I suppose you mean by all the evidence you mean all pertinent evidence, because some might not be material to the latter issue. As I stand [1950] here I cannot think of any.

The Court: If there is any such, and both sides may present any further evidence.

Mr. Marrin: Any further evidence.

Mr. Wittschen: It is my understanding that any evidence that your Honor has heard is applicable to all the issues in the case wherever it is material.

Mr. Marrin: Is that agreeable, Mr. Alexander?

Mr. Alexander: That is agreeable to the cross defendant surety companies.

Mr. Wittschen: Your Honor, while I am before the Court might I make a request? When we set up our figures in our counter claim and cross complaint we had to set them up on the work already completed. Since then we have had an audit, and rather than file a new document, which I think would be confusing, I would like, with the consent of the Court, to take the original cross complaint and change the figures on the face, with counsel, and have the clerk initial the changes that we have made.

Mr. Alexander: I would feel, before acceding to that request, something should be said. If counsel proposes to make just little trivial changes, as a matter of courtesy, of course, that would be acceded to, but if it is something substantial I do not think it will be.

The Court: You would object to a couple of hundred thousand dollars?

Mr. Wittschen: It is \$42,000.

Mr. Alexander: I want to have something to say about the \$42,000, and we think that showing of \$42,000 ought to be brought along the usual lines.

The Court: They may indicate how the figures are made up. [1951]

Mr. Wittschen: I will illustrate what I mean. For instance, we state the reasonable cost of completing the work agreed to be done was \$1,725,000

even. Now we find that it is \$1,751,611.74. We just want to put in the actual figures. In one or two places we have reduced them, but the net result is there is an increase of substantially \$40,000 in the figures.

Mr. Alexander: Your Honor, as far as the original cross complaint is concerned I do not think it states a cause of action under the contract or on the bond. It is a suit brought, among other things, for reasonable value, and the contract, itself, specifies in particularity how the amount of their damages, if any, are to be ascertained, and before your Honor makes a ruling on this, I would like to present that matter formally.

The Court: There is only \$42,000. Both sides will have an opportunity to meet that. The only thing is instead of wanting to file a new cross complaint he wants to insert those figures.

Mr. Alexander: I do not think it is so simple. The filing of a new cross complaint will invite a formal attack upon it. This is not a case of a little courtesy, there is a substantial sum involved.

Mr. Wittschen: I am not asking for any courtesy. You have got me all wrong. I think we have a right to amend to conform to the proof after we put the proof in. What I was suggesting was that practically every figure that we have put in our cross complaint is changed, because we put them in more than two years ago, while the work was still in progress, for instance, we state in one that the cost of running the District was \$288 a day, while

it is \$278, and certain figures like that, we have had to change as time has gone on. For instance, we overlooked crediting the doing of certain work which had not gone far enough to be included in the [1952] estimate, this \$2,800 they are credited with; in other words, instead of putting in a complete whole they put in a half whole, and that had to be finished. I am not changing a single principle. I am just striking out one figure and substituting for that figure another one. There are no changes made. I am perfectly ready and willing to meet Mr. Alexander on his claimed defense that it does not state a cause of action against the sureties at any time, and suggest that if you want to set it down for argument for two o'clock this afternoon we will be ready.

Mr. Alexander: It would be quite agreeable if some issue was presented.

Mr. Wittschen: There is no change of issues presented in any way. I was just trying to save time.

The Court: Your objection is not to the figures, then?

Mr. Alexander: No, but the substance of the entire cross complaint, and by acquiescing or being silent I might waive very substantial rights.

Mr. Wittschen: I understand you have a special defense in, to the effect that it was the District's obligation under its contract to do this work, itself, and not let it to rebidding, and also that you claim that the action was prematurely brought, because it

should have brought the cross complaint after the job had been finished, and on each of these special defenses we are prepared to argue at any time.

The Court: There is nothing at this time before the Court.

Mr. Wittschen: Shall this go over, then?

The Court: Yes, it may go over. There is one fact the Court has in mind, namely that this \$42,000 in addition should be limited to the prayer of your complaint.

Mr. Wittschen: You mean by the prayer of the complaint? [1953]

The Court: Yes, this present pleading is an additional \$42,000.

Mr. Wittschen: But this is not on any additional item. We are simply substituting other figures, we do not change any of the language. In one case we found, for instance, that we were deducting or attempting to deduct penalties twice; we had already retained 20 days penalties, so instead of charging them 433 days it should be 413 days; that is a reduction in their favor. It is just things like that, in checking over the complaint, that the figures should be changed.

Mr. Smith: As I understand it, the matter is over. You are not offering the suggested change now

Mr. Wittschen: Yes, I would like to do it. I would like to do it during the noon hour, change your complaint and change the one the Court has, if there is no objection, and substitute new figures.

Mr. Alexander: I certainly object to substituting new figures, in view of the fact that I do not think the cross complaint should be amended at all.

The Court: Are you prepared to argue that now?

Mr. Alexander: I would be glad to, but in order to argue it we have got to have something before the Court. I had assumed counsel would present a serious matter of that kind, involving \$42,000, in new figures to which we could raise objection. \$42,000 is a lot of money.

Mr. Wittschen: I will be glad to retype this whole thing over.

Mr. Alexander: I do not want to cause trouble to anybody, and the purpose of my objection is not to cause additional typewriting, because that entails work on my part, but I do want to reserve my rights.

Mr. Wittschen: Your rights will be all reserved, because I take it when we offer evidence of our damage you are going to object [1954] that the figures in the complaint were different from the ones we now put in. I am willing to put the evidence in and amend to conform to the proof.

The Court: The only thing we are concerned with for the moment is figures.

Mr. Wittschen: If you want to go to the merits I think that is all right. I assumed we were to go ahead with our cross complaint at this time, and counsel has indicated that they want to argue the matter, and if they are ready I presume that should be taken up now.

The Court: Very well.

Mr. Smith: We understood your Honor you did not care to hear argument on that, and therefore you were going to proceed with your cross complaint.

The Court: I indicated to you, if I remember, that both sides had been associated with this for the past two or three years. If you wish to argue this matter we can dispose of the matter.

Mr. Wittschen: I would like to have it disposed of.

Mr. Smith: We both said we did not feel we could do our clients and ourselves justice in preparing an argument between Saturday and Tuesday, in view of the length of the record, and the importance of the subject-matter, and the various exhibits, and your Honor, as I understood it, suggested that you did not desire to hear argument before the conclusion of the cross complaint, anyway.

Mr. Wittschen: I did not so understand it, because our time would be wasted.

The Court: The truth of the matter is if we are going to proceed here under the rule the Court must rule before I can entertain the cross complaint.

Mr. Wittschen: That is my understanding.

Mr. Smith: There is not any rule on it. [1955]

The Court: There is not any rule.

Mr. Smith: It is a matter of procedure, that is entirely discretionary with the Court.

The Court: It would seem reasonable that we could not proceed in the manner that you suggest before the major thing is taken care of, namely the

breach of this contract, and before we can proceed with the cross-complaint we must take care of that matter.

Mr. Wittschen: Unless there was a breach of the contract there could be no cross complaint.

The Court: If I thought otherwise there would be no need of wasting any further time.

Mr. Smith: We are in this position, that we tried to ascertain carefully from your Honor on Saturday—that was the purpose of our visit to you—the visit was suggested by Mr. Marrin and myself, and we advised counsel that we were coming up to see you for the purpose of finding out what your Honor's desire was as to further procedure, and also for importuning your Honor to give us a reasonable time in which to prepare for argument, if you would listen to argument.

The Court: I think I answered that by saying that no one at any time was ever denied an opportunity to be heard.

Mr. Smith: That is correct.

The Court: I think that was my language.

Mr. Wittschen: Now is your opportunity to be heard.

Mr. Smith: But we have made it very clear we could not in justice to the case present an argument in view of the length of the record this morning.

The Court: That would be true if you had not been wrestling with your problem for two or three years, the nature of the case, and the preparation for it during that period of time, with a full [1956]

day before that time; as to the facts and the law it seems to me that is a reasonable time. Now, is there any case in addition to those that you have cited that you have in mind that would change the situation?

Mr. Smith: Might I be permitted to confer with my associate? We will submit the matter without argument at this time.

Mr. Wittschen: We will submit the matter also.

The Court: What is the matter now before the Court, for the purpose of the record?

Mr. Wittschen: I take it the Court should rule upon a motion for judgment in the District's favor on the issues raised by the complaint and answer, that is to say, the right of the plaintiff to rescind the contract, if the Court rules in favor of the defendant in that matter then we should be ordered to proceed with the cross complaint.

The Court: Let the record show a ruling in favor of the defendant.

Mr. Wittschen: On the issues raised by the complaint and answer?

The Court: By the complaint and answer.

Mr. Smith: To which we except.

The Court: Note an exception.

Mr. Alexander: We also join in the exception. I don't know as we have to, but we do.

The Court: Let the record so show.

Mr. Smith: Will it again be stipulated as previously stipulated between you and Mr. Marrin that the time for presenting findings shall be in accordance with the rules of this Court, under Rule 42?

Mr. Wittschen: I stipulated it a little differently; in other words, that findings could be prepared after the Court had decided the issues raised by the cross complaint and your answer thereto.

[1957]

Mr. Smith: Yes.

Mr. Wittschen: And that you need not prepare findings now upon the matter upon which the Court has just ruled, on either side.

Mr. Smith: You have not prepared any?

Mr. Wittschen: I have not submitted any. I intend to submit them all at once. With that understanding I make a request for special findings.

The Clerk: Motion for judgment in favor of the defendant granted upon special findings to be presented and filed in accordance with Rule 42?

Mr. Wittschen: Yes.

Mr. Smith: The preparation of special findings is included in that order?

Mr. Wittschen: Yes, but the Court has directed the preparation of special findings.

The Court: Yes.

Mr. Wittschen: And submit them to the other side.

The Court: Yes, and give them an opportunity to amend.

Mr. Wittschen: I told Mr. Marrin that the State procedure in the matter would be agreeable to me, that is to say, we would prepare and serve them on you and file them with the Court. Is that agreeable?

Mr. Smith: Yes, we will have an opportunity to check them and present our findings.

Mr. Alexander: We wish to ask for special findings on all issues involved in the future proceedings as well as in the past proceedings.

The Court: So ordered. In other words, I do not want either side to waive any of their legal rights.

Mr. Wittschen: No. [1958]

The Court: You must keep within the rule, but if there is anything of any substance that either side has omitted, it may be brought up.

Mr. Wittschen: I think that stipulation covers it.

The Court. I think so. Proceed with the cross complaint. [1959]

WALLACE B. BOGGS,

Recalled, by cross complainants; previously sworn.

Mr. Tinning: During the three-day holiday, the certified public accountant's report which had been prepared during the last two weeks was served upon Mr. Boggs and myself; we only had an opportunity to examine it on Friday night, and it contains some matters that were not proper under our pleadings; in other words, the accountant apparently misunderstood our instructions and included in the cost of operating the District all of the costs of operating the District even though they were attributable to litigation; and, since we discovered that on Friday night, we put him to work and were promised

(Testimony of Wallace B. Boggs.)

a final report at one o'clock today,—the detailed schedules to support those items. I have here a copy of the final figures which I obtained at eleven o'clock last night, and I can proceed with this, but I cannot bring you his certificate to the schedules that support these figures until two o'clock this afternoon. I am ready to proceed with the schedules that I have here now but I cannot give you the certified public accountant's certificate.

Mr. Smith: Would it expedite matters to adjourn until two p. m.?

Mr. Tinning: Perhaps we can go ahead, and we can qualify Mr. Boggs. There are a number of things we can go right on with, and I think we can save time.

Mr. Smith: Well, we were hopeful of stipulating on some items there.

Mr. Wittschen: We have those items that you said you would stipulate on; but now we have Mr. Alexander's objection—

Mr. Smith: His objection does not go, if I understand it, to the fact; it goes to the right to receive the fact.

Mr. Wittschen: Yes, I understand that. [1960]

Mr. Smith: Is that correct, Mr. Alexander?

Mr. Alexander: Yes.

Mr. Marrin: From your own statement, Mr. Tinning, you could not very well proceed without the certified public accountant's findings.

Mr. Tinning: These figures are all based on his findings; it is the final work of getting his support-

(Testimony of Wallace B. Boggs.)

ing files. There are, of course, hundreds of items that have been used and we did not get those figures until last night. We will go ahead and if there is anything we cannot agree on, then we will ask for an adjournment until two o'clock.

Direct Examination

Mr. Tinning: Q. Mr. Boggs, you testified, on Friday, that you had been District Engineer of Joint Highway District No. 13 of the State of California since September, 1932, continuously up to this date?

A. Yes.

Q. It would follow, from that, that you were in charge in the preparation of the plans and specifications for the project of the District?

A. Yes.

Mr. Alexander: May I ask that the answer go out for the purpose of making an objection, your Honor?

The Court: Yes.

Mr. Alexander: At this time, your Honor, I think the objection should be raised that we were previously discussing, namely, that the cross complaint does not state a cause of action and cannot be maintained by the cross complainant. I am a little uncertain whether the question should be addressed to the particular issue before the Court, but I don't want to take any chance of waiving it.

Mr. Wittschen: Your Honor, we were about to qualify the witness to show he could have an opinion as to the reasonable value of [1961] completing the

work; and when we ask the ultimate question, I take it your objection will be timely.

Mr. Alexander: I thought that was what you were doing, but I did not want to take any chance. I might state, your Honor, our objection runs to the entire cross complaint and consequently runs to the taking of any evidence under it.

The Court: Very well. I think we should dispose of the question for the purpose of the record now. Proceed.

Mr. Alexander: Very well, your Honor. At this time, your Honor, we not only object to the question upon the grounds that I will state, but we move to dismiss the cross complaint of the cross complainant, Joint Highway District No. 13 of the State of California, the motion being made, so far as I am concerned, on behalf of the cross defendants surety companies. No doubt the other defendant will make an appropriate motion.

Mr. Smith: Yes.

Mr. Alexander: Along the same lines. The grounds of the motion are as follows:

That the cross complaint does not state a cause of action;

Secondly, that the cross complaint was prematurely filed in that the District's claim for damages and right to recover is based upon Paragraph 5 of the contract, Section 6Q, Subdivisions 1, 2 and 3 that I will specify. Paragraph 5 of the contract—it contains really two paragraphs, but I will refer

to them from time to time as Paragraph 5—or maybe I have not the right word—

Mr. Smith: "Article," I think.

Mr. Alexander: —Article 5 or Section 5 or Paragraph 5, reads as follows—

The Court: Pardon me. What page is that on?
[1962]

Mr. Alexander: In the complaint?

The Court: Yes.

Mr. Alexander: It will be in the exhibit attached to the cross complaint.

Mr. Wittschen: Paragraphs XI and XII of your answer to the cross complaint.

Mr. Alexander: Your Honor, I was just referring to the contract itself, and a copy of it is attached to the cross complaint.

The Court: Yes.

Mr. Alexander: Have you the cross complaint there, your Honor?

The Court: Yes.

Mr. Wittschen: Mr. Alexander, not to interrupt your argument, but for the Court's information, Paragraphs XI and XII of your answer are typewritten out there.

Mr. Alexander: Reading Article 5 from the Contract:

"That the second party—" that would be the Contractor (reading:) "—further agrees that if the work to be done under this contract and agreement shall be abandoned, or if this contract shall be assigned by the second party,

or if at any time the District Engineer shall be of the opinion, and shall so certify in writing to the said first party that the said work or any part thereof is unnecessarily or unreasonably delayed, or that the said second party is wilfully violating any of the conditions or covenants of this contract, or is executing this contract in bad faith, the said first party shall have the power to notify the said second party to discontinue all work or any part thereof under this contract, and thereupon the said second party shall cease to continue said work or such part thereof as said first party may designate, and the said first party shall thereupon have the power to place such and so many persons, and to obtain by contract, purchase or hire, such animals, carts, wagons, implements [1963] tools, material or materials, by contract or otherwise, as said first party may deem advisable, to work at and be used to complete the work herein described, or such part thereof as the agent authorized to superintend the same may deem necessary, and to use such material as they may find upon the line of said work and to charge the expense of such labor and material, animals, carts, wagons, implements and tools to the second party, and the expense so charged shall be deducted and paid by the first party out of such moneys as may be either due or may at any time thereafter become due

to the said second party under and by virtue of this contract or any part thereof.

"In case such expense is less than the sum which would have been payable under this contract, if the same had been completed by the said second party, the said second party shall be entitled to receive the difference, and in case such expense shall exceed the last said amount, then the said second party or its bondsmen shall pay the amount of such excess to the first party on notice from the said first party of the excess so due."

The Court: You have in mind a demand for that amount?

Mr. Alexander: It is not, your Honor, a case of a formal demand, just a formal demand, but if I can digress just a moment, I can give the authorities later on. It has been said a number of times that when the parties stipulate in their contract for the method of ascertaining the loss, if any, either way, —either a profit or a loss, —that that must be followed; and until there is an audit on the completion of the work and a determination of the amount and which way the balance lies, one way or the other, no cause of action has accrued to either of the parties— or, no cause of action has accrued, rather, to the owner. [1964]

Now, in connection with the provisions of the contract which I read, I want to read a portion of Section 6Q of the specifications. You will find it on

page 7; and passing over Sections 1 and 2, we will get to the pertinent part, Section 3, or Subsection 3 of the section of the specifications, which reads—There are provisions in the specifications somewhat similar to those which I read to your Honor which are in the contract, and then this:

“In case such expense is less than the sum which would have been payable under this contract at the unit prices bid, as calculated from the District Engineer’s final estimate if the work had been completed by the Contractor, then the Contractor shall be entitled to receive the difference, but in case such expense shall exceed the last said amount then the Contractor and his bondsmen shall be jointly and severally liable to pay the amount of such excess to the District on notice by the District of the amount of excess so due.”

Now, we see from that this is not an ordinary contract where if there is a breach a cause of action arises. There is a specific provision in the contract of how the loss to the owner, if any, shall be ascertained, and it is specifically provided in the specifications and the contract that the owner shall go ahead, shall complete, shall determine the final estimate, and when all the work is done and, —then using the language of the contract, —“give notice to the second party or its bondsmen.” which way the balance lies.

Mr. Wittschen: May I ask you a question, Mr. Alexander? The provision in the specification and the provision in the contract are substantially identical. You are not making any point on any difference of language—

Mr. Alexander: No, no; they are substantially identical. I [1965] read the portion of the specifications because that shows what is to be done: go ahead and get the final estimate and then determine which way the balance lies; if the District has made a profit, they must send a check to the Contractor; on the other hand, —which is the case here, —if the final estimate shows a loss, then give notice to the sureties or the Contractor, and, at that time, a cause of action arises, but not before.

Until the work was completed and the expense estimates as provided in the section of the contract and specifications, and until the plaintiff in this action, or the cross-defendant surety companies, were given notice by the District of the amount of the excess in excess of what it would have been if the Contractor had completed the work, no cause of action accrued to the District against the cross-defendant surety companies, or against the cross-defendant Contractor.

Another ground that I want to address to the Court at this time—I am not certain if it comes up just at this point, but it may facilitate matters later on if I make the point now: Section 4D of the specifications provides for liquidated damages at the

rate of \$500 a day for delay in completing. That, we submit, is in conflict with Paragraph 5 of the contract. Paragraph 5 of the contract specifically provided how the amount of damages shall be ascertained if there is an abandonment of the contract, and I read, your Honor, just how it is to be calculated.

Now, Section 25 of the contract signed by the parties provides that in case there is a discrepancy or conflict between the specifications and the contract that the contract shall control. Here, the contract provides the particular means of ascertaining the damages, and therefore supersedes in a case of this kind the provisions for liquidated damages. The cross-complaint in this case, as your Honor [1966] will note, is based upon the reasonable cost of completing the work; and we submit cannot be maintained in this case. If it were a case of a contract that had been breached by a contractor, upon the breach such damages as the party sustained, the District in this case, it would give a right of action; but when we have a particular means of ascertaining the amount of damages, we are not interested in reasonable costs of completion at all, because the contract itself provides how the damage is to be ascertained, namely, go on and complete, get your final estimate of the Engineer, and then find where the balance lies.

I want to say, in passing, also, that the cross-complaint contains items of alleged claims for dam-

age, and claim that the District is entitled to liquidated damages. It is not entitled to these items. They have put them both in, but it is quite apparent if they are entitled to liquidated damages—I don't think they are—they are not entitled to the other and vice versa.

Another ground which I want to call to your Honor's attention is this: that there has been a breach of the contract by the District in its method of completing. The District was given authority to complete on an abandonment, if there was an abandonment; I don't concede there was one, but for the purpose of my argument I am using that term; the District may proceed as provided in Paragraph 5, or Article 5, of the contract, and when that is analyzed it means that it must proceed with its own labor and not, as I understand from what has been said, by contracting the work to others. Let us read the pertinent part. Now, there is not any question that if the contract itself provides a method of completing, it is a breach of the contract on the part of the District to proceed otherwise; and if there is such breach, it precludes the District from recovering [1967] damages. I think when you analyze this paragraph it means that the District may by contract obtain materials and tools and vehicles, but the work is to be done by its own labor and not, as I understand, by contracts. This particular phase of the argument may be a bit premature, but I will

follow it up, because we will meet it later on, I am sure.

(After Recess)

Mr. Alexander: Continuing, your Honor, with the grounds of the motion, I have noted that in setting forth my grounds I have interspersed a bit of argument from time to time, but I know you will forgive me. At the conclusion of stating the grounds, I will proceed to the argument and refer to the authorities.

The Court: Very well.

Mr. Alexander: I want to say one thing in passing and in stating my grounds: The point I stated in regard to prematurity, when there is a specific provision in the contract, has been commented on in the Circuit Court of Appeals of this Circuit; and it points out that a clause of that kind is to make the contract definite and certain and to rescue the case from the uncertainty and speculative control of expert witnesses.

Mr. Wittschen: You did not give us the case.

Mr. Alexander: I will give it to you presently; I will give you them all afterwards. I mean to say there is a real reason for a clause of that kind. Everybody knows where they stand; and we do not have to have testimony of experts to determine the reasonable cost, what is or what is not reasonable cost; but we have a fixed standard.

Passing on the next ground of the motion, there is another reason why, under the contract, the Dis-

trict may not prevail on this [1968] cross-complaint, and, namely, it is the District, as I understand the proof that it tends to offer, completed the project by independent contracts; they made contracts, —a number of contracts; whereas the provision here, as I read to your Honor, means, as I understand it, that the District shall complete with its own labor; contracting to get tools and implements, —using the language that they have used, —and to charge the expense of such labor, materials, animals, carts, wagons, implements and tools to the second party. When you analyze the provision on which they made that, you will see the only thing that they could contract to complete the job is for the obtaining of materials, tools and equipment; but the balance is to be done by, —using the peculiar language, —“placing such and so many persons” on the job.

Now, I want to call your Honor's attention to abandoning, and the points that I have been making in that regard, particularly the first point, the prematurity point, the contract providing how the measure of damages shall be ascertained, and, until the contract is completed and until under the specific provision the final estimate is made by the Engineer and the balance struck, no cause of action arises. Now, we have here a cross-complaint on file in December, 1936. The project was not completed until twelve months after that time, showing that a whole year the action was premature.

I also point out another reason why the cross-complaint cannot be maintained: The cause of action had not matured at the time the cross-complaint was filed; but the cross-complaint was chucked in, —pardon me for that expression, —and they had some seventeen parties defendant: the District and 16 sureties on this, their independent cause of action against the sureties and against the Contractor, that we are about to proceed on. [1969]

An analysis of the complaint will show there is no jurisdiction in this court to entertain a cross-complaint against two of the defendants who are residents of the State of California, —the Fireman's Fund and Pacific Indemnity Company; so the Court is lacking in jurisdiction to entertain the cross-complaint.

Another provision that I am urging, which, of course, is only on behalf of the sureties; the provision for liquidated damages does not apply to the sureties.

Paragraph 5 which I read before provides that after the balance is struck, then the second party, —that would be the Contractor or its bondsmen, —shall pay the amount of such excess. In other words, they contemplate that, on abandonment of the contract, the damages shall be estimated or ascertained in this way: the sureties shall be notified and, —according to the language, —they shall pay the excess but not liquidated damages.

I want to urge further, in support of grounds for these motions, all of the grounds that were urged heretofore in support in our joining the motion of the plaintiff for judgment.

Here follows the argument of Mr. Alexander in support of his motion which has been omitted by stipulation. [1970]

Mr. Smith: We wish to join in the position and all of the positions taken by counsel for sureties, except one, but before doing that it occurs to us that several points in the record are not clear at this time, that we think should be cleared up. There has been no determination by the Court upon the motion made by plaintiff to strike certain evidence of the defendant. The motion was merely submitted, and, as I understand it, there was likewise no ruling by the Court upon a similar motion made by the defendant as to certain evidence introduced in behalf of the plaintiff, so that the record is not clear as to the Court's action on either of those motions at this time. Also there was no determination or ruling by the Court upon the motion that we made, both on Friday last and this morning, asking the Court for a declaration of judgment in our favor and for a declaration of law in our favor, and the record shows no action taken upon those matters, so I think the record should be cleared up in that respect before I discuss this objection that Mr. Alexander has made.

Mr. Wittschen: Mr. Smith, don't you think when the Court directed judgment for the defendant on the main issue that that was a denial of your motion on the main issue?

The Court: No, the record does not disclose it. The Court is prepared to rule. There is a denial of the motion now so that the record will be clear.

Mr. Smith: To which we note an exception.

Mr. Alexander: May we also except?

Mr. Smith: With regard to the motion to strike, they call for a separate and independent ruling.

The Court: Yes. Have you summed them up?
[1983]

Mr. Smith: Yes, we filed a written motion to strike.

The Court: I want an opportunity to check it and I will rule at two o'clock on that, unless there is some particular thing you want to call the Court's attention to.

Mr. Wittschen: All you want is as to the P.W.A. contract?

Mr. Smith: Also we want a ruling upon the motion made by you in an attempt to strike some of the evidence.

Mr. Wittschen: We moved to strike out. There has been no ruling. I don't care whether the Court rules on it. In other words, it was a motion to strike out the geological report, Exhibit 22, as I recall it, and a map that immediately followed, which was a tracing that the witness Calhoun made therefrom,

Exhibit 23; my memory of those exhibits may be faulty, I think they are correct, and I will check them.

The Court: Check on them. I will take up any motions at two o'clock either side may want to make.

Mr. Smith: We also desire to present some further argument on the objection which Mr. Alexander made.

The Court: We will be in recess until two o'clock.

(A recess was here taken until two o'clock P. M.)
[1984]

Afternoon Session

Mr. Smith: The Court indicated just prior to the 12 o'clock adjournment that it would rule on the various motions to strike, on which there has been no ruling as yet, and we think that that ruling should be made so that the record will be clear.

The Court: Have you checked up?

Mr. Wittschen: Those are exhibits 22 and 23, the only two that we made any motion with reference to.

The Court: Those are the two that you had in mind, the geologist's report, and what is the other?

Mr. Wittschen: And the map that was attached to it, from which the tracing was made.

The Court: For the purpose of the record I will grant the motion.

Mr. Smith: To which we note an exception.

Mr. Alexander: We also except.

The Court: Note the exception.

Mr. Smith: Then there is a motion by the plaintiff to strike certain of the defendant's evidence.

The Court: That is so general I do not recall what it was.

Mr. Smith: If your Honor please, it concerns the P.W.A. regulation which was sent by Washington to the District two years after the contract was entered into.

The Court: Pardon me, but didn't you make a typewritten statement?

Mr. Marrin: I made a typewritten statement.

The Court: Get it for the record.

Mr. Smith: Plaintiff moves to strike from the record Exhibit WWW, introduced by the defendant (Transcript page 804). [Page 1409 this printed record.] [1989]

The Court: Let us check that, what was that?

Mr. Smith: Being a purported letter of regulations of the Federal Emergency Administration of Public Works, containing Administrative Order of Federal Emergency Administration of Public Works No. 54, together with a letter from the Chief of the Bureau of Public Roads transmitting same, and also a letter from one C. H. Sweetser transmitting

same, all of said documents having been introduced as one exhibit.

Mr. Wittschen: Let us take that up.

Mr. Smith: Our ground on both of these is the same. Both of these are in the same category, as I understand the motion, so I would like to have it extend to both of them.

The Court: There is no privity of contract, here, is there?

Mr. Wittschen: There is in this way, the specifications, the supplemental specifications state that the contractor would agree to all of the rules and regulations heretofore or hereafter promulgated. Then in addition to that we have shown it by the testimony of Mr. Price, showing it with the testimony of Mr. Stephen Bechtel, and in fact it is in evidence that the P. W. A. inspectors were always present at all of these conversations. So we contend that in the face of their acquiescence all the way through to P. W. A. inspection, to asking us to get the P. W. A. to change the hours of labor and to change other matters, and particularly in view of the fact that our specifications provide that they would be bound by the P. W. A. regulations, that that regulation of the P. W. A. which referred to the withhold penalty was a regulation by which we were bound and they were bound; and that there is privity of contract by reason of the reference to it in our specifications. What I did say when we made the offer was that we did not care anything

about the letter of transmittal nor the letter of Mr. Sweetser. [1990] There was a letter from Washington to Sweetser and a letter from Sweetser to us. We do not care anything about those. Mr. Smith asked if we would not put the letters in too because they fixed the date.

Mr. Smith: The merits of the motion are not directed to those two letters.

The Court: The record is here and I suggest you indicate for the purpose of the record the purpose of the offer, so that it will be cleared up.

Mr. Smith: Also plaintiff moves to strike from the record Defendant's Exhibit No. 0-4 (Transcript page 1458 [Page 471 Book of Exhibits], being grant agreement between the United States of America and Joint Highway District No. 13 for a grant of money to construct the project of the defendant District.

This motion is made upon the ground that the said exhibits have no relationship of any kind or character to the plaintiff or to its relations with the defendant under its contract with the defendant, and on the ground that there was and is no privity of contract between the plaintiff and Federal Emergency Administration of Public Works and said exhibits are not binding upon plaintiff, and upon the ground that plaintiff had no notice of any kind or character of the existence of any contract between the District and Federal Emergency Administration of Public Works until long after the

contract between plaintiff and defendant was made; and that for these reasons the said exhibits were and are irrelevant, incompetent, and immaterial, and tend to prove no issue in the case.

Mr. Alexander: The cross-defendant surety companies make the same motion upon the same grounds.

Mr. Wittschen: The purpose of the offer of these exhibits in each case is to show and rebut the claim of the plaintiff that the District acted arbitrarily in deducting the penalties, and that the [1991] District also delayed the work in refusing to give permission to the changes, particularly with reference to the dropped sections, and those two documents show that the United States Government was interested in the project, that it had contributed a certain sum thereto in excess of one million dollars, that no changes could be made in design without the consent of the P. W. A. authorities, which were being administered locally through the Bureau of Public Roads and the documents were admitted to show that the District acted as it did by reason of those matters and things, namely, that the Government was interested and also that their introduction is justified by a provision in the specifications, an amendment and supplement to the final specifications dated January 9, 1934, which reads as follows:

“Attention of all bidders under these specifications is called to the fact that since the adoption of the final plans and specifications for the project of Joint Highway District No.

13 on the 30th day of March, 1933, and the approval thereof by Earl Lee Kelly, Director of the Department of Public Works of the State of California on the 5th day of April, 1933, the President of the United States has approved the National Industrial Recovery Act and in accordance with law has created a Public Works Administration and a special Board for public works, and that said National Industrial Recovery Act and the rules and regulations approved by said special Board for public works required consideration by bidders in submitting proposals under said plans and specifications.

“The attention of all bidders is hereby specifically called to Bulletin No. 2 of Federal Emergency Administration of Public Works entitled ‘General Information and Instructions for the Guidance of State Advisory Boards and State Engineers (P.W.A.).’ A [1992] grant of thirty (30) per cent of the cost of labor and material used in the project of the District has been made by the Public Works Administration of the United States under the terms of said National Industrial Recovery Act, and all bidders are hereby advised that the Directors of the District will cooperate with the Public Works Administration and all its officers and employees in the enforcement of all of the provisions of said National Industrial Recovery Act, and the rules and regulations heretofore

and hereafter promulgated applicable to the performance of the work on the project of the District."

And it is by reason of that provision that we claim that these are tied in.

Mr. Smith: At the time the offer of these documents in evidence was made by the defendant through its counsel and the witness we objected on the ground that there is absolutely no privity of contract between Six Companies of California, the plaintiff in this case, and the P.W.A., and that these clauses which counsel has directed to the attention of the court have to do entirely with labor conditions on the work, and the reference that he has made is to the National Industrial Recovery Act and the conditions of employment of men and things of that sort were involved, and we concede that they were, but there is absolutely no mention of any kind or character at any place in the testimony in this case, or in the exhibits in this case, of any facts which drag into the case any document exchanged between the District and the Bureau of Public Roads as agent for P.W.A., or P.W.A. advice, and that on the P.W.A. the objection is presented on the ground that the evidence is all hearsay as to this plaintiff, not binding upon it in any manner, not within any issue framed by the case, and therefore is absolutely immaterial, irrelevant, and incompetent. [1993]

Mr. Wittschen: These rules not only cover the rules for labor but the rules and regulations heretofore and hereafter promulgated applicable to the performance of the work on the project of the District.

Mr. Smith: The performance of the work has to do with labor.

Mr. Wittschen: The Six Companies recognized the P.W.A. authorization was necessary for this dropped section, and in fact they were told if they went ahead with the dropped section it would be at their own risk, in the event the P.W.A. did not approve it, so I think the P.W.A. control is pretty well sticking out throughout this case.

Mr. Smith: We do not concede the accuracy of the statement made by counsel as to the effect of the evidence, without impugning his statement as being what he thinks the evidence shows. We did not at any time admit the P.W.A. had any jurisdiction over anything in this case, except hours of labor, and the mere fact that the District saw fit to run over to the P.W.A. to get permission to do anything does not bind us at all; if they wanted to do it it was because they wanted to do it for their own purpose, and not for anything with respect to us.

The Court: The Court is prepared to rule if both sides are satisfied with the record.

Mr. Wittschen: Yes.

The Court: The Court will allow this testimony and limit it to the offer which is disclosed by coun-

sel, and it may or may not measure up to the privity of contract of Six Companies. It is my present thought, however, when it was admitted it was for the purpose that counsel has indicated and with that limitation the court allows it.

Mr. Smith: I take it your Honor's statement amounts to a statement of a denial of the motion to strike the evidence. [1994]

The Court: The motion will be denied.

Mr. Smith: To which ruling we take an exception.

Mr. Alexander: We also except.

Mr. Smith: Now, referring to the cross-complaint which is before your Honor at this time, the situation procedurally is this, the cross-complainant District, defendant in the principal case, is now seeking to establish by proof its right to recover on the allegations made by its cross-complaint. The cross-defendants, the surety companies represented by Mr. Alexander, have made to your Honor a motion for a dismissal or at least a motion equivalent to dismissal of that cross-complaint. We join in that motion.

We move for a dismissal of the cross-complaint on the ground that it was prematurely filed and there is nothing before the Court in connection with same, and that the filing cannot be cured at this time.

We further move for a dismissal of the cross-

complaint upon the jurisdictional point that there is no diversity of citizenship thereunder.

The Court: As to two of the sureties.

Mr. Smith: Two of the sureties are alleged in the cross-complaint to be residents of the State of California, and that creates no diversity of citizenship.

Then we also desire to supplement the argument made by Mr. Alexander upon the objection raised that the cross-complaint does not state a cause of action under any consideration. [1995]

Here follows the argument of Mr. Smith in support of his motion and the argument of Mr. Wittschen for defendant and cross-complainant in reply to the arguments of Mr. Alexander and Mr. Smith, which arguments have been omitted by stipulation. [1996]

The Court: Is the matter submitted?

Mr. Wittschen: It is submitted.

The Court: With the exception of the two sureties, which have not been covered, the Court at this time is prepared to deny the motion on the cross-complaint.

Mr. Alexander: Would your Honor wait for the authorities that Mr. Smith is going to present?

The Court: The authorities that you spoke of?

Mr. Alexander: That Mr. Smith spoke of in regard to jurisdiction.

The Court: I have indicated that I would not rule on the two sureties, that is to say I have not

decided in relation to jurisdiction as to the two sureties. I will hear you tomorrow as to that.

Mr. Smith: Then it is understood that none of the matters have been denied?

The Court: The motion to dismiss will be denied with that exception. You can present any argument or any authorities on that tomorrow morning. I am indicating that ruling now solely that we can go forward. Here we have spent another day. I realize it is important to both sides, but I am going to warn you now that unless I change my views, unless there is something in the jurisdictional question, if I have not acquired jurisdiction over those two it follows that I have no jurisdiction over them. They are jointly and severally liable is my own thought, and at least I have jurisdiction over those. As to whether the two other sureties are liable [2045] I am not prepared to rule.

Mr. Tinning: I understand you do not object to presenting authorities with reference to the question of jurisdiction?

The Court: No.

Mr. Tinning: Otherwise you are ready to rule?

The Court: Yes.

Mr. Smith: I suggest for the clarity of the record that you withhold your entire ruling on the matter.

The Court: Very well. I wanted to warn you so that you will know my state of mind.

Mr. Alexander: There is no ruling?

The Court: There is no ruling as to those two. I want argument. You requested time until tomorrow morning to present argument on that. On the case as presented it is my present thought that on the proceeding here that I have jurisdiction of the non-resident foreign corporations, and I am in doubt about the two. The only reason I am in doubt about that is if I have not jurisdiction over those two I have no jurisdiction over any of them.

Mr. Smith: That would be the rule in the State Court, and I take it it applies to a cross-complaint here.

Mr. Wittschen: Might I make this observation, even though the motion was granted we could cross-complain against the Six Companies and you would have to hear the evidence on that, even if all of the sureties went out.

Mr. Smith: If all of the cross-defendants are subject to the ruling you cannot cure it by a dismissal as to resident defendants.

Mr. Wittschen: No, but if we have no jurisdiction over them we have jurisdiction over you.

Mr. Smith: If you had limited the filing of the cross-complaint in that manner, yes, but in view of the fact you have not, no. [2046]

Mr. Wittschen: We will look that up, because I don't know anything about it now.

The Court: We may make some headway here so that we won't spend any time on it tomorrow.

Mr. Smith: I take it your Honor has kept open your ruling on all of the features of these motions.

The Court: Yes.

Mr. Smith: And the objection that the cross-complaint does not state a cause of action?

The Court: I have only indicated what I have so as to warn you of what I am going to do tomorrow morning, for the purpose of being able to go on. My present state of mind is that I shall deny the motion to dismiss.

Mr. Smith: Also in addition to the motion to dismiss there was objection made to the introduction of evidence on the ground that the cross-complaint does not state a cause of action.

The Court: I will rule on that tomorrow morning. The only thing I am in doubt about is the jurisdiction of the two sureties, and then I may be in error, but you will have a record, as I have indicated to you previously, that you can comfort yourself with. We will take an adjournment now until tomorrow morning at ten o'clock.

(An adjournment was here taken until tomorrow, Wednesday, June 1, 1938, at ten o'clock a. m.)

[2047]

Wednesday, June 1, 1938

10 o'Clock A. M.

The Court: You wanted an opportunity to be heard this morning, if my recollection is correct.

Mr. Smith: Your Honor, the point we were discussing when we closed last evening was the question of jurisdiction.

The Court: Yes; and you asked for more time, if my memory is correct, for a search of the authorities.

Mr. Smith: We are satisfied our point is well taken, but we will submit it on the statements made yesterday.

Mr. Wittschen: Don't you agree, Mr. Smith, after that search of the authorities, that if there is a severable proceeding against citizens of the state they may be dismissed from the case and the action proceed as to the others?

Mr. Smith: I wouldn't say that I would agree to it.

The Court: I have thought about it almost up to sunrise this morning. I suggest this, if agreeable to both sides and in order to protect the record, I will deny the motion at this time with the understanding you may renew it at the conclusion of the case and then we will have the evidence in the record.

Mr. Wittschen: Put the evidence in, and then at the conclusion of that evidence such motions as——

The Court: You may renew your motion, if that is agreeable. If you insist on it, I will rule upon it now.

Mr. Smith: Well, the procedure of it is entirely up to your Honor. We raised the point, and we submit it to the Court.

The Court: Very well.

Mr. Wittschen: I looked into the matter, and it is my present view,—I did not know much about it last night,—that so far as the two California defendants are concerned, if they impair the [2048] Court's jurisdiction, they may be dismissed from the case, and as long as all the other parties are noncitizens of this state the action may proceed as to them. I call your Honor's attention that the bond specifying each surety takes a separate share of the liability, one for 4 per cent and one for 7 per cent; so undoubtedly the action could proceed as to the others. By reason of the press of time, I am not so sure we have exhausted the authorities on the subject, and I am still having those looked up; so, if your Honor does proceed with it, I don't think anything will be lost, because I feel we could make a motion at any time before the close of the case to drop those two out.

The Court: It is my present opinion that I have jurisdiction. However, in spite of that, I will retain jurisdiction with the understanding that I will determine it after all the facts are in.

Mr. Wittschen: Yes, your Honor.

The Court: That is, if it does not burden either side or interfere with the record.

Mr. Wittschen: No. The only possible impairment there could be would be as to the two California defendants; and I am satisfied, from our present search of the authorities, if they stand in the way they could be dismissed out without impairing the others.

Mr. Smith: We don't wish to be put in the position of consenting to it, your Honor.

The Court: Very well.

Mr. Smith: Your Honor has proceeded and, if there is no jurisdiction, you cannot acquire jurisdiction, and we raised the point and we insist upon it.

The Court: No; if I have not jurisdiction, I cannot acquire it. There is this to be considered in this case that is peculiar: [2049] Under the cases I have heard and searched for, keeping in mind the nature of the case, I think with safety this court could acquire and hold jurisdiction, and, if I fail to do that, then you see the situation and the multiplicity of suits, and this case then is to be tried all over in the state court.

Mr. Wittschen: That is right as to the two that would be possibly impaired.

The Court: I think, if the record is protected, I have no doubt about obtaining jurisdiction to dispose of it on equitable grounds.

Mr. Wittschen: Well, in an equity case, your Honor could—

Mr. Alexander: Mr. Wittschen, I do not like to interrupt you, but we want to hear what you are saying back here and we are having great difficulty.

Mr. Wittschen: Very well. It is a law case, if the Court please.

The Court: It is a law case, and there is no doubt about the equity.

Mr. Wittschen: No. In 117 Federal, there is a case from this Circuit, the equity side, and some United States cases; they are cited in Simpkins Federal Procedure. The trouble is this is a law case. If we make an error, it is also held that it cannot be corrected on appeal; so, before the case is over, we can dismiss as to the two California defendants.

The Court: The reason I am taking the view that I am, I thought possibly—we have the peculiar condition here, both sides would be served in any event, and if you find that you are satisfied with your position you can renew your motion and I will dispose of it in that way.

Mr. Smith: Well, we shall never renew the motion, your Honor, [2050] because we made the motion to save our record on any proceeding.

The Court: Well, if you insist on the ruling, the Court will rule.

Mr. Smith: Yes, I think we can only protect the record.

Mr. Wittschen: Well, I would like to ask your Honor to defer it, in view of the fact we have only had last night and such time as we could crowd in this morning, and my present view is that, to be very frank, as long as this is a law case, we may not want to take a chance and hold in the two California defendants; but we can proceed as to the others; but, as long as we are to proceed anyway and it does not add to the burden one way or the other, I would not like to make a dismissal until I have had a little more time.

The Court: Today is Wednesday. I will have the matter up on Tuesday.

Mr. Wittschen: Very well; and we will exhaust the authorities.

The Court: So, both sides can have the record protected.

Mr. Tinning: It may be possible, your Honor, we will conclude the taking of testimony, in view of certain discussions that we have had. I don't know whether we will proceed that long. There may be a stipulation of facts.

The Court: My only purpose is trying to assist both sides.

Mr. Smith: It is not a matter of assisting, your Honor. We are merely suggesting to your Honor that the law provides the Court is without jurisdiction. If it is without jurisdiction, the Court is powerless to act in passing on the motion on jurisdiction——

Mr. Wittschen: It is only without jurisdiction as to those two defendants.

Mr. Smith: Let me finish, please, Mr. Wittschen.

Mr. Wittschen: Certainly. Pardon me.

Mr. Smith: This is not the kind of a matter that is arguable [2051] on the merits of the facts of the case at all. It is a matter that is either right or wrong as to the principle of the Court's power to proceed.

The Court: Don't misunderstand me. The only thing I am trying to do is serve both sides.

Mr. Smith: Well, we would like to have the matter passed on. We think it is a primary motion.

The Court: What percentage have those two surety companies?

Mr. Wittschen: 7 per cent for one and 4 for another; so that we could proceed against all the others. I have looked that much up. I am satisfied on that. Your Honor may retain jurisdiction as to the others; there is no doubt about that; and, if we have to act now, we can dismiss those two; we have the dismissals ready; but, as long as no one will be hurt in postponing that until the conclusion of the evidence, the same evidence will come in as to the others, I am asking your Honor merely to defer your ruling so that I can have another chance at the authorities.

The Court: Very well.

Mr. Smith: We will suggest the continuing of the other two defendants in will be error, and make

a motion that, if you feel they should be dismissed, they be dismissed immediately.

Mr. Alexander: I join in that motion.

The Court: You wish to let the matter stand open?

Mr. Wittschen: Yes, your Honor.

Mr. Smith: May we have an exception?

The Court: I already ruled it may be submitted at this time. I will ask counsel who has asked for time to renew his motion after he has had an opportunity to make a search.

Mr. Smith: We ask the Court's action in submitting the matter be excepted to; that we be allowed to except to your Honor's ruling [2052] in submitting it.

The Court: Very well.

Mr. Smith: It is the kind of a motion that must be passed on immediately.

Mr. Alexander: We also make an exception, your Honor, to protect the record.

Mr. Wittschen: Do you prefer to wait until the proof is in?

The Court: No. They insist on a ruling.

Mr. Wittschen: Well, your Honor does not have to accommodate them unless you want to. I asked that you put it over until the conclusion of the case.

The Court: Very well. Proceed.

The Clerk: What was the ruling on the motion, your Honor?

The Court: The motion to dismiss the two sureties— You better name them, for the purpose of the record.

Mr. Smith: The two which he has in mind—I assume you have in mind the two California defendants?

Mr. Wittschen: Yes; the Pacific Indemnity and the Fireman's Fund. If I conclude before the case ends that their presence in the suit jeopardizes the jurisdiction, we will file a dismissal.

The Court: Very well. Let the matter stand submitted.

Mr. Smith: We again except to the Court's order submitting the matter.

Mr. Alexander: We also except, your Honor.

Mr. Wittschen: On these amendments to the figures, to get them out of the way, do you prefer that we wait until we put our proof on and then amend to conform to the proof? I want to say in one or two cases we will have to make amendments because we are giving you a credit for some \$2800 on work that did not go into any [2053] estimate because it was not so far finished that it could, or because we have moved some figures up and some down. They only involve the counterclaim, or the cross-complaint and the prayer, and it may be done in ten minutes or so: take the figures that they are insisting on and inserting them. Do you object to that being done now? If so, we will put our proof on and then ask leave to amend to conform.

Mr. Smith: We don't object to the mechanical method of doing it, but our objection goes to the proposition that we do not want to waive another objection.

The Court: That the Court has no jurisdiction?

Mr. Smith: Not only that; but based on the fact you have no right to proceed along the lines that you have because the action is prematurely brought and because the cross-complaint has no status, and these provisions outlined in the contract——

Mr. Wittschen: I understand. Subject to the objection that Mr. Alexander expressed to the Court, the fact of the prematurity and the fact that the exact provisions, as you claim, of the contract were not followed, and subject to the further objection you think the entire cross-complaint should be dismissed, you have no objection to the amendments?

Mr. Smith: No objection to the manner in which you are making it.

Mr. Alexander: I want to state that Mr. Wittschen, with all his niceness, has not stated our position. We would accord any courtesy to him, but, I think, to accept that very nice little suggestion of his would be to waive rights, which we cannot do.

Mr. Wittschen: There is no objection to my making it subject to all the objections that you have heretofore made? Is that [2054] correct?

Mr. Alexander: I cannot agree to anything. I am going to make it as easy as I can; but I am not going to put in— He knows; we discussed this off the record, outside of court; he knows what we have

said; but I am not going to make any statement in court indicating that I agree to a plan that may waive valuable rights.

Mr. Wittschen: Then, I suggest,—and I would ask your Honor's permission,—when that is in, to amend to conform.

WALLACE B. BOGGS,

recalled, by cross-complainant;

Direct Examination (resumed)

Mr. Tinning: Q. Mr. Boggs, what was your university training?

A. I graduated from the College of Civil Engineering at the University of California in 1912.

Q. Are you a member of the American Society of Engineers?

A. I am a member of the American Society of Civil Engineers.

Q. Since you have graduated from the University of California, have you continuously engaged in the practice of engineering?

A. Yes, except for the period when I was in the Army during the World War.

Q. What has your experience been as an engineer, commencing with the time that you left college; making it very brief, Mr. Boggs, what was your first work?

A. Upon graduation, I was employed by Haviland and Tibbitts, a firm of consulting civil engi-

(Testimony of Wallace B. Boggs.)

neers. My work was in connection with street work, drainage work and reclamation work. I was with them from 1912 to 1915. In 1915, I left their employ and became employed by Bondy and L'Hommedieu, a firm of civil engineers in Oakland; and I was with them for about one year. I [2055] was the chief assistant engineer of the firm, and the work was primarily reports on irrigation, reclamation work and subdivisions and street work in the Eastbay area.

Q. How long were you with Bondy and L'Hommedieu? A. Approximately a year and a half.

Q. What did you do next?

A. Following that, I was employed by the Eastbay Water Company on the San Pablo Dam and Tunnel project. This work was just starting in the fall of 1916. I was the field engineer. I was assistant to the project engineer, and had charge of the inspections and the survey work upon that project which at that time consisted of the building of a diversion dam on San Pablo Creek, and of a tunnel,—waste water tunnel,—approximately 1400 feet in length and excavated about 18 feet in diameter.

Q. That is not what has been referred to in the evidence in this case as the San Pablo Tunnel that runs from the Dam westerly into Berkeley or El Cerrito?

A. No; that is not. That is the waste water tunnel; it was designed to take care of the surplus waters from the dam; the small tunnel which you

(Testimony of Wallace B. Boggs.)

refer to was started shortly before I left that project.

Q. How long were you in the Army; during what period?

A. I was in the Army from October, 1917 to July, 1919.

Q. Were you in the Engineering Corps?

A. Yes; I was a second lieutenant of Engineers.

Q. During the period you were in the Army, did you engage in engineering work and construction?

A. Yes; I did. During my war service, we constructed roads immediately back of the front line work, but following that I was sent on up into Germany and had charge of approximately three or four hundred men in the construction of barracks and supply depots for the Army of Occupation.

[2056]

Q. After you left the Army in 1919, where were you employed?

A. I was employed by P. A. Havilland who was county surveyor of Alameda County, and also engaged in practice as a civil engineer. I was employed as chief draughtsman in the office in Oakland.

Q. How long did you continue in the county surveyor's office of Alameda County?

A. I continued in the county surveyor's office of Alameda County until January, 1931. Upon Mr. Havilland's death in 1921, he was succeeded by Mr. George A. Posey, and I became Mr. Posey's chief

(Testimony of Wallace B. Boggs.)

assistant in charge of all the office and field work, inspections on all the work done by the county which consisted primarily of highway construction projects and the Oakland-Alameda Tube which was built during that time, and, in addition to that, he did private work upon which I was associated. The private work consisted of reports on reclamation work and also street and sanitary designs and construction in the Eastbay area.

Q. Prior to your leaving the county surveyor's office in 1931, did any part of your duties include work in connection with the project of this district?

A. Yes, sir. From the start of that project, approximately 1928, up to the time I left, why, that work was under my general supervision.

Q. Under your general supervision, you being a subordinate to Mr. Posey?

A. A subordinate to Mr. Posey, —his chief assistant.

Q. When I say Mr. Posey had charge of it, it is true, is it not, up to the time of Mr. Posey's death, that both he and the county surveyor of Contra Costa County, R. Arnold, were working jointly for the two counties?

A. Yes, sir.

Q. Mr. Posey's office was the office from which they employed engineers for the District, the draughtsman, people working up what was to be done, actually occupying space in Mr. Posey's office?

A. Yes, sir. [2057]

(Testimony of Wallace B. Boggs.)

Q. You have already testified that you became District Engineer in September, 1932, and continued to this date? A. Yes.

Q. It is a fact, is it not, Mr. Boggs, that the project of this District which is involved in this action is located within the boundaries of Contra Costa County and Alameda County and is known as Joint Highway District No. 13 of the State of California?

A. Yes, sir.

Q. How much did the State of California contribute to this project?

A. The State of California contributed a total of \$700,000.

Q. How much did the United States contribute to this project? A. \$1,095,000.

Q. At any time after the District deducted \$3500 for delay from estimates from the amount paid the Contractor, Estimate No. 24, did Six Companies of California ask the District Engineer of this District, in writing or otherwise, to determine whether or not the District had properly deducted the liquidated damages?

Mr. Smith: Just a moment. The question is objected to on the ground it is incompetent, irrelevant and immaterial for the reason that the question elicits an answer which has nothing to do with the issues of the case, and, further, that the testimony cannot be received because the cross-complaint does not state facts sufficient to constitute a cause of action.

(Testimony of Wallace B. Boggs.)

Mr. Alexander: We make the same objection, your Honor.

Mr. Wittschen: There is a provision in the specifications that requires all disputes that in any manner touch on those specifications or that contract to be submitted to the District Engineer, and I have here, your Honor, two or three cases that point to this very fact: the deduction of penalties for delay from a similar clause is done and was thereupon submitted to him for decision. We are merely asking him if they ever asked him—— [2058]

Mr. Smith: I will add to that objection, in view of counsel's statement, that the estimate which is involved shows on its face that the witness in question exercised his alleged judgment, although we question he had any in the premises, and did deduct the penalty over his signature; so it is immaterial.

Mr. Alexander: I urge the same objection, if your Honor please.

The Court: Read the question.

(Pending question read)

The Court: You had better reframe the question.

Mr. Tinning: Very well, your Honor.

Q. At any time after Estimate No. 24. —which was issued by the District on the 9th day of June, 1936, from which estimate \$3500 was deducted for liquidated damage for delay, —did Six Companies of California request the District Engineer, in writing or otherwise, to determine whether or not the District had fairly deducted the liquidated damage?

(Testimony of Wallace B. Boggs.)

Mr. Smith: I make the same objection.

Mr. Alexander: We make the same objection.

The Court: The objection will be overruled.

Mr. Smith: Note an exception, please.

Mr. Alexander: We note an exception.

The Witness: A. No.

Mr. Tinning: Q. After Estimate No. 24 was issued by the District Engineer and the check in payment of the amount shown by that estimate was sent to the Six Companies of California on or about the 10th day of June, 1936, did Six Companies of California request the District, in writing or otherwise, —the District Engineer, —to determine any of the questions raised or set forth in the notice of purported rescission dated June 13, 1936? [2059]

Mr. Smith: To which we make the same objection as heretofore made.

Mr. Alexander: And I will make the same objection.

The Court: Objection overruled.

Mr. Smith: Exception.

Mr. Alexander: We note an exception.

The Witness: A. No.

Mr. Tinning: This is a preliminary question, gentlemen.

Subsequent to June 13, 1936, when Six Companies of California, the plaintiff in this action, ceased work on the project of the District, was it necessary for the District to measure the work that had been completed, for the purpose of determining the work which remained to be done?

(Testimony of Wallace B. Boggs.)

Mr. Smith: We object to the question on the ground it calls for a conclusion of the witness and on the same ground the objection was made to the previous questions.

Mr. Alexander: We make the same objection, your Honor.

The Court: I will allow it as a preliminary question.

Q. You may answer it.

The Witness: May I have the question read?

(Pending question read by the reporter.)

Mr. Smith: The question is particularly vicious; the question says: "Was it necessary?" The purpose is not indicated, and the question of necessity has nothing to do with it.

The Court: The Court has ruled.

The Witness: A. Yes.

Mr. Smith: I already noted an exception.

Mr. Tinning: One moment, your Honor, there has been so much discussion here.

The Court: We will take a recess.

(Recess) [2060]

(After recess)

Mr. Alexander: Your Honor, before proceeding, for the record, I was not clear, and am not clear yet, as to whether your Honor had denied the motion to dismiss the cross-complaint, or had reserved your ruling.

The Court: I denied it.

(Testimony of Wallace B. Boggs.)

Mr. Alexander: Then if that is so, if we have not already reserved an exception we ask to do so at this time. Note an exception.

Mr. Smith: Note an exception.

Mr. Tinning: Q. Mr. Boggs, subsequent to June 13, 1936, at the time the Six Companies of California quit the work, did the Joint Highway District No. 13 of the State of California advertise for bids for the project as a whole, the bids to be tendered on the 11th of September, 1936?

Mr. Smith: I object to the question on the same grounds previously stated.

Mr. Alexander: And we join in the objection.

The Court: The objection is overruled.

Mr. Smith: Exception.

Mr. Alexander: Exception.

A. Yes.

Mr. Smith: I do not like to be a chronic objector, but in view of your Honor's ruling, under the Federal practice it is necessary to object.

Mr. Tinning: I understand. You are in the same position as we were in connection with protecting the record. We cannot make a general stipulation that will cover the whole line of it. I will try to keep that in mind.

Q. Were any bids received by the District on September 11, 1936?

Mr. Smith: The same objection.

Mr. Alexander: I think we may gain time if we state at this [2061] time the grounds of the objection

(Testimony of Wallace B. Boggs.)

to the question and then later on we can simply say "The same objection" if that will be in order.

The Court: Very well.

Mr. Alexander: We object to that question on the ground it is immaterial, irrelevant, and incompetent, that no cause of action was stated in the cross-complaint, that the cross-complaint was filed prematurely and before the amount of expense was determined as provided in Article V of the contract, and Section 6(Q), Subdivisions 1, 2 and 3 of the specifications, and that the cross-complaint is based upon an attempt to recover a reasonable cost of completion and not to recover damages as provided in the contract; that the contract provides the district must complete with its own labor as provided in Article V, and not with other contracts or sub-contracts.

Mr. Wittschen: Might I call your attention, if you stand on the ground it is incompetent we will have to prove this by original records.

Mr. Alexander: We are not raising the point that the original records are not here.

Mr. Wittschen: Or that summaries are used?

Mr. Alexander: Or that summaries are used.

Mr. Wittschen: You are waiving that?

Mr. Alexander: That is not the point of the objection. We do not make those two objections.

Mr. Smith: We are in the same position as Mr. Alexander, and in addition I want to add to the objection that proof of reasonable cost or reasonable

(Testimony of Wallace B. Boggs.)

expenditures made is not proof or proper proof of damages under this cross-complaint.

Mr. Alexander: We add that to our objection

The Court: The objection will be overruled.

Mr. Smith: Note an exception.

Mr. Alexander: Note an exception. [2062]

Mr. Tinning: Subsequent to September 11, 1936 did the District adopt amendments and supplements to the specifications which were adopted on the 23rd of September, 1936?

Mr. Smith: Objected to on the same grounds, the same grounds of objection made I now repeat.

Mr. Alexander: The same objection.

The Court: Read the question.

(Question read by the reporter.)

Mr. Wittschen: I think, in view of the objection, we had better put in the various contracts that speak for themselves.

The Court: I am thinking about change of contract.

Mr. Tinning: The proof will go to the fact that the work, in other words, the only thing that was done by the supplement was to divide the same work which is described in the original plans and specifications into eight parts; there was no different work of any kind. It followed right along. The proof will show that eight separate contracts were let, one contract for boring the tunnel and putting in the structural lining, another to put in the partitions in the lining of the tunnel, and the pave-

(Testimony of Wallace B. Boggs.)

ment, another man put in the electrical, mechanical and ventilating equipment, another man finished the building, another man finished the pavement, and so on, and the testimony will show and the exhibits will show that it is identical with the supplemental specifications of September 23, it simply divided the work up, and all the work was done under the specifications, the original specifications that Six Companies worked under, that this supplement divided it up.

The Court: The only thing is the record.

Mr. Tinning: I think in view of the way the objection is made we will have to put the records in. I do not think it is safe otherwise to proceed. [2063]

The Court: Very well. In order to have the record clear, if you depart from this original contract you get into difficulties, that is my thought.

Mr. Tinning: The proof that we propose putting in, in view of the fact that counsel do not feel that they can stipulate—

The Court: I understand that.

Mr. Tinning: I think that we ought to put in the documents in the way it was done in the other case or we will have to put in copies. They are agreeable to that, as I understand.

Mr. Smith: Yes.

Mr. Alexander: Yes.

Mr. Tinning: I think we ought to prove each proceeding, so that the record will show what is being done.

The Court: Very well, proceed.

(Testimony of Wallace B. Boggs.)

Mr. Tinning: I offer in evidence, if your Honor please, a resolution of the Board of Directors of Joint Highway District No. 13, approving the supplement to specifications accompanying and forming a part of the final surveys, plans and specifications and detail drawings of the District which were adopted on the 30th of March, 1933, the supplement and resolution referred to being passed and adopted on the 17th day of August, 1936, and I ask that it be marked Defendant's Exhibit in proper order.

The Court: It will be admitted and marked.

Mr. Smith: Why don't you adopt a new series of numbers on the cross-complaint?

Mr. Tinning: We will ask that it be marked X-1.

Mr. Smith: To the offer we object on the same grounds previously stated.

Mr. Alexander: We also make the same objection.

Mr. Wittschen: May it be understood for the record that there [2064] will be no objection because copies are used instead of the original?

Mr. Smith: Yes.

Mr. Alexander: Yes.

The Court: The objection is overruled.

Mr. Smith: Exception.

Mr. Alexander: Exception.

(The resolution was marked "Defendant's Exhibit X-1.")*

*See Agreed Statement of Facts set out at page 495 of the Book of Exhibits.

(Testimony of Wallace B. Boggs.)

Mr. Tinning: I offer in evidence the certificate of Earl Lee Kelly, Director of Department of Public Works of the State of California, approving the supplement authorized by the District on the 17th of August, 1936, the certificate being dated the 18th of August, 1936.

Mr. Smith: To which we make the same objection.

Mr. Alexander: The same objection.

The Court: Let it be admitted next in order

Mr. Smith: To which we note an exception.

Mr. Alexander: We note an exception.

(The certificate was marked "Defendant's Exhibit X-2.")*

Mr. Tinning: The defendant offers in evidence supplement to specifications adopted August 17, 1936, as Defendant's Exhibit X-3.

Mr. Smith: The same objection.

Mr. Alexander: The same objection.

The Court: The same ruling.

Mr. Smith: Exception.

Mr. Alexander: Exception.

(The document was marked "Defendant's Exhibit X-3.")

[Set forth in the Book of Exhibits at page 501.]

Mr. Tinning: Defendant offers in evidence the

*See Agreed Statement of Facts set out at page 495 of the Book of Exhibits.

(Testimony of Wallace B. Boggs.)
minutes of the Board of Directors of the District for the meeting of September 11, 1936, held at the hour of 12 o'clock noon, the minutes, your Honor, showing that no bids were received on that date.

Mr. Smith: To which we object for the same reasons previously [2065] stated.

Mr. Alexander: The same objection.

The Court: The same ruling.

Mr. Smith: To which we note an exception.

Mr. Alexander: Exception.

(The document was marked "Defendant's Exhibit X-4.")*

Mr. Smith: It would seem to me between now and two o'clock we could make out a statement as to those exhibits to which we did not object and put it in that way.

The Court: The only idea I have in mind is to have a proper record.

Mr. Tinning: Maybe we can work something out. I think it is worth trying. Forty minutes now may save four days. May we have an adjournment now until two o'clock?

The Court: We will take an adjournment now until two o'clock.

(A recess was here taken until two o'clock p. m.)

[2066]

*See Agreed Statement of Facts set out at page 495 of the Book of Exhibits.

Afternoon Session

Mr. Wittschen: I have checked the authorities further upon that matter of those two California defendants, and at this time the defendant and cross-complainant Joint Highway District No. 13 of the State of California, a public corporation, hereby dismisses without prejudice its cross-complaint as against cross-defendants Fireman's Fund Indemnity Company, a California corporation, and Pacific Indemnity Company, a California corporation, only, dated June 1st, and signed by the attorneys for the defendant and cross-complainant, and will file that with the clerk.

Mr. Smith: We object to any dismissal of any of the defendants on the ground that the cause cannot be separated for purposes of a dismissal, and on the further ground the dismissal comes too late.

Mr. Alexander: We make the same objection, your Honor.

The Court: Motion will be granted; note an exception.

Mr. Alexander: We except.

Mr. Smith: We except to the order granting the motion.

WALLACE B. BOGGS,

recalled.

Mr. Tinning: Your Honor, in view of the stipulations or understanding that we have had here before, that the plaintiff and cross-defendants would not object to the introduction of copies of documents, I offer, and I make now—every document which I will expect to put in, I make an omnibus offer.

Mr. Smith: Let me understand your statement—copies rather than originals?

Mr. Tinning: Well, I think that is sufficient: copies rather than originals, or the fact that copies of resolutions are not original certified copies.

[2067]

Mr. Smith: Yes.

Mr. Tinning: Copies of certified copies.

The Court: Subject to any correction that may hereafter be made if there is any doubt?

Mr. Tinning: Yes.

Mr. Smith: And we will have an objection to their admissibility which we will state after Mr. Tinning makes the offer.

Mr. Tinning: Yes. For the purpose of permitting the one objection to all of the evidence that is offered, the offer is made in this omnibus form to save time. The last exhibit we had was X-4. The defendant offers the following documents as exhibits in proper order, commencing with X-5*: certified

*See Agreed Statement of Facts set out at page 495 of the Book of Exhibits. ●

(Testimony of Wallace B. Boggs.)

copy of resolution of board of directors of Joint Highway District No. 13 of the State of California, adopted August 19, 1936, calling for bids for completion of project.

As X-6*, affidavit of publication of notice to bidders in Oakland Tribune, bids that were to be received on September 11, 1936.

As Exhibit X-7*, certified copy of resolution of board of directors of Joint Highway District No. 13 of the State of California adopted August 26, 1936, rescinding resolution adopted August 19, 1936, giving notice to contractors; and giving notice to contractors that bids for completion of project would be received; and directing publication of notice to bidders in Oakland Tribune.

The next Exhibit will be X-8*: Affidavit of publication in Oakland Tribune—bids to be received September 11, 1936.

Next in order is X-9*: Resolution of board of directors adopted September 23, 1936, rescinding supplement to specifications adopted August 17, 1936; and approving supplement to specifications dividing work into Schedules A to H. [2068]

Next is X-10*: Certificate of Earl Lee Kelly, Director of Department of Public Works of the State of California, approving supplement to specifications of September 23, 1936.

Next in order is X-11: Supplement of September 23, 1936.

*See Agreed Statement of Facts set out at page 495 of the Book of Exhibits.

(Testimony of Wallace B. Boggs.)

[Set forth in the Book of Exhibits at page 534.]

Next in order is X-12*: Resolution of board of directors adopted September 25, 1936, giving notice to contractors that bids would be received October 16, 1936, for work included within Schedule "A."

Next in order is X-13*: Affidavit of publication of notice to bidders in the Oakland Tribune for bids to be received under Schedule "A."

Next in order are Exhibits X-14a*, 14b* and 14c*, X-14a being the bid of George Pollock Company and R. G. Clifford; 14b being the bid of Mas L. Hanger Company; 14c being the bid of W. A. Kettlewell and W. S. Mead; all of the same being bids on Schedule "A."

Next is X-15*: Resolution of board of directors adopted October 21, 1936, awarding contract to George G. Pollock and R. G. Clifford, for the work included under Schedule "A."

Next in order is Exhibit X-16*: Contract between Pollock and Clifford and Joint Highway District No. 13 of the State of California, dated November 9, 1936, for the work included in Schedule "A."

Next in order, Exhibit X-17*: Bond executed by Pollock and Clifford with the District and the corporate sureties for the faithful performance of the contract under Schedule "A" dated November 9, 1936.

*See Agreed Statement of Facts set out at page 495 of the Book of Exhibits.

(Testimony of Wallace B. Boggs.)

Next in order is Exhibit X-18*: Resolution of board of directors approving bond for faithful performance, the bond being furnished by Pollock and Clifford.

Next in order is Exhibit X-19*: Bond securing material men and laborers, furnished by Pollock and Clifford, which was dated on [2069] November 9, 1936, for the work under Schedule "A."

Next in order is X-20*: Resolution of board of directors approving bond furnished by Pollock and Clifford in connection with material men and laborers' rights.

Next is X-21*: Resolution of acceptance of Schedule "A", the final estimate.

Those documents, gentlemen, include three or four different matters. There is a resolution accepting, a certificate of the Engineer and a letter transmitting the——

Mr. Smith: That is accepting it?

Mr. Tinning: Accepting the completion of the work under this one.

Mr. Smith: What is the date?

Mr. Tinning: I have not got that in my minutes; but it was some time in June, 1937. It shows on the exhibit, and you have a copy of it.

Mr. Smith: Yes.

*See Agreed Statement of Facts set out at page 495 of the Book of Exhibits.

(Testimony of Wallace B. Boggs.)

Mr. Tinning: Next in order is X-22*: Resolution of Board of directors adopted November 9, 1936, giving notice to contractors under Schedule "B"; that is for the grouting of the tunnels; bids to be received December 4, 1936.

Next is X-23*: Affidavit of publication of notice to contractors under Schedule "B," publication having been made in the Oakland Tribune.

Next are X-24a* and 24b*, and come in order: the bids received under Schedule "B"; X-24a being the bid of R. G. Clifford; and X-24b being the bid of Case Construction Co.

Next in order is X-25*: Resolution of board of directors adopted December 14, 1936, awarding contract for Schedule "B" grouting to [2070] R. G. Clifford.

X-26* is a contract between R. G. Clifford and the District.

X-27* is the bond for faithful performance furnished by R. G. Clifford under the contract for Schedule "B."

X-28* is a resolution of the board of directors adopted December 24, 1936, approving bond for faithful performance, furnished by Clifford on his contract for Schedule "B."

X-29* is bond securing material men and laborers under Schedule "B".

Next is X-30*: Resolution of board of directors adopted December 24, 1936, approving bond secur-

*See Agreed Statement of Facts set out at page 495 of the Book of Exhibits.

(Testimony of Wallace B. Boggs.)

ing material men and laborers, which was furnished by Clifford on his contract for Schedule "B."

Next in order is X-31*: Resolution of acceptance of the Schedule "B" and final estimate.

Again, that comprises two or three documents, and, for the sake of having the subject matter together, it runs on several months, gentlemen.

Next in order is X-32*: Resolution of board of directors adopted November 9, 1936, giving notice to bidders on Schedule C, D, E and G, bids on Schedule C to be received December 9, 1936.

Next in order is X-33*: Affidavit of publication in the Oakland Post-Enquirer of notice to contractors, bids to be received under Schedule "C."

Next is X-34a* and 34b*: the bids received for Schedule C, Fred J. Early and George Pollock & R. G. Clifford.

Next is X-35*: Resolution of board of directors adopted December 14, 1936, rejecting all bids received December 9, 1936, for work under Schedule C; and requesting leave to do the work with District forces. [2071]

Next is X-36*: Resolution of board of directors adopted January 7, 1937, calling for bids under Schedule "C", "D," a second time, calling for bids to be received on January 27, 1937.

Next is X-37*: Affidavit of publication of notice to bidders, Oakland Post-Enquirer, for Schedule "C."

*See Agreed Statement of Facts set out at page 495 of the Book of Exhibits.

(Testimony of Wallace B. Boggs.)

X-38a* and X-38b* and X-38c* are the bids received for Schedule "C," on January 27, 1937; "a" being from Fred K. DuPuy; "b" from Fred J. Early, Jr.; and "c" from John F. Knapp.

X-39* is a resolution of board of directors, adopted February 2, 1937, awarding contract to Fred K. DuPuy, for Schedule "C."

X-40* is a contract with Fred K. DuPuy and the District for the work included within Schedule "C."

X-41* is a bond for faithful performance of Schedule "C."

X-41* is a resolution of board of directors adopted February 19, 1937, approving faithful performance bond, Schedule "C."

X-43* is bond securing material men and laborers, Schedule "C."

X-44* is a resolution of board of directors adopted February 19, 1937, approving bond securing material men and laborers on Schedule "C."

X-45* is a resolution of acceptance of Schedule "C," and resolution re Withhold.

The situation, I think, gentlemen, some of you know; I think you have some cases pending; the contractor under Schedule "C" had notices to withhold filed against him which were in excess of the amount of the payment up to that time, and he completed his work,—finished the work; and the matter has been held up by the withhold notices, and, since

*See Agreed Statement of Facts set out at page 495 of the Book of Exhibits.

(Testimony of Wallace B. Boggs.)

that time, all of it has been paid out. There is some \$30,000 including the \$109,000 that was withheld.

X-46*: Affidavit of publication of notice to bidders, Oakland [2072] Tribune, Schedule "D." This was covered by a resolution which I have referred to before as X-32. This affidavit was in the Oakland Tribune.

X-47a* and X-47b* are the bids received for Schedule "D," on December 9, 1936; "a" being from Fred J. Early, Jr.; and "b" being from K. E. Parker Company.

X-48*: Resolution of board of directors adopted December 14, 1936, rejecting all bids received December 9, 1936, for Schedule D; and requesting authority to do work with District forces.

X-49*: Affidavit of publication of notice to bidders, Oakland Tribune, Schedule D.

X-50a*, X-50b* and X-50c*: Bids received for Schedule "D," January 27, 1937; "a" from E. T. Lesure; "b" being from Fred J. Early, Jr.; "c" being from K. E. Parker.

X-51*: Resolution of board of directors adopted February 2, 1937, awarding contract to E. T. Lesure, Schedule "D."

X-52*: Contract, E. T. Lesure with District, Schedule "D."

X-53*: Bond for faithful performance, Schedule "D."

*See Agreed Statement of Facts set out at page 495 of the Book of Exhibits.

(Testimony of Wallace B. Boggs.)

X-54*: Resolution of Board of Directors adopted February 9, 1937, approving faithful performance bond, Schedule "D."

X-55*: Bond securing material men and laborers, Schedule D.

X-56*: Resolution of board of directors adopted February 9, 1937, approving bond securing material men and laborers, Schedule D.

X-57*: Resolution of acceptance of Schedule D, and final estimate.

X-58*: Affidavit of publication of notice to bidders, Post-Enquirer, Schedule "E."

X-59*: Bid received for Schedule E, December 18, 1936, Alta Electric and Mechanical Company, Inc.

X-60*: Resolution of board of directors adopted December 24, [2073] 1936, awarding contract to Alta Electric and Mechanical Company, Inc., for Schedule E.

X-61*: Contract, Alta Electric and Mechanical Company, Inc., with District, Schedule E.

X-62*: Bond for faithful performance, Schedule E.

X-63*: Resolution of board of directors adopted January 7, 1937, approving faithful performance bond, Schedule E.

X-64*: Bond securing material men and laborers, Schedule E.

*See Agreed Statement of Facts set out at page 495 of the Book of Exhibits.

(Testimony of Wallace B. Boggs.)

X-65*: Resolution of board of directors adopted January 7, 1937, approving bond securing material men and laborers, Schedule E.

X-66*: Resolution of acceptance of Schedule E, and final estimate.

X-67*: Resolution of board of directors adopted February 9, 1937, calling for bids for Schedules F and H, to be received March 10, 1937.

X-68*: Affidavit of Publication of notice to bidders, Oakland Post-Enquirer, Schedule F.

X-69*: Bids received for Schedule F, March 10, 1937: Alta Electric and Mechanical Company, Inc.

X-70*: Resolution of board of directors adopted March 16, 1937, awarding contract to Alta Electric and Mechanical Company, Inc., for Schedule F.

X-71*: Contract, Alta Electric and Mechanical Company, Inc., with District, for Schedule F.

X-72*: Bond for faithful performance, Schedule F.

X-73*: Resolution of board of directors adopted April 8, 1937, approving faithful performance bond, Schedule F.

X-74*: Bond securing material men and laborers, Schedule F.

X-75*: Resolution of board of directors adopted April 8, 1937, approving bond securing material men and laborers, Schedule F. [2074]

*See Agreed Statement of Facts set out at page 495 of the Book of Exhibits.

(Testimony of Wallace B. Boggs.)

X-76*: Resolution of acceptance of Schedule F, and final estimate.

X-77*: is an affidavit of publication of notice to bidders in the Oakland Tribune, Schedule "G", covered again by resolution Exhibit X-32, or the exhibit X-32 under this offer.

X-78a*, 78b* and 78c*: the bids received for Schedule G, on December 18, 1936; "a" being the Heafey-Moore Company bid; "b" being Fredrickson & Watson Construction Company bid; and "c" being George Pollock & R. G. Clifford.

X-79*: Resolution of board of directors, awarding contract to Heafey-Moore Co., adopted December 24, 1936, for Schedule G.

Exhibit X-80*: Contract, Heafey-Moore Co. with District, Schedule G.

Exhibit X-81*: Bond for faithful performance, Schedule G.

Exhibit X-82*: Resolution of board of directors adopted January 15, 1937, approving faithful performance bond, Schedule G.

Exhibit X-83*: Bond securing material men and laborers, Schedule G.

Exhibit X-84*: Resolution of board of directors approving bond securing material men and laborers, Schedule G.

Exhibit X-85*: Resolution of Acceptance of Schedule G, and final estimate.

*See Agreed Statement of Facts set out at page 495 of the Book of Exhibits.

(Testimony of Wallace B. Boggs.)

Exhibit X-86*: Affidavit of Publication of notice to bidders, Oakland Tribune, Schedule H.

Exhibit X-87*: Bid received for Schedule H, March 10, 1937, Moore Dry Dock Co.

Exhibit X-88*: Resolution of board of directors adopted March 16, 1937, rejecting bid of Moore Dry Dock Co., received March 10, 1937, for Schedule H, as excessive. [2075]

Exhibit X-89*: Resolution of board of directors adopted March 16, 1937, calling for bids for Schedule H the second time—bids to be received March 31, 1937.

Exhibit X-90*: Affidavit of publication of notice to bidders, Oakland Tribune, Schedule H.

Exhibit X-91*: Bids received for Schedule H, March 31, 1937: Moore Dry Dock Co.,—its second bid.

Exhibit X-92*: Resolution of board of directors adopted March 31, 1937, rejecting bid of Moore Dry Dock Co., received March 31, 1937, for Schedule H.

Exhibit X-93*: Resolution of board of directors, calling for bids for Schedule H the third time,—bids to be received April 12, 1937.

Exhibit X-94*: Affidavit of publication of notice to bidders, Oakland Tribune, Schedule H.

Exhibit X-95a* and Exhibit X-95b*: Bids received for Schedule H, April 12, 1937, under third

*See Agreed Statement of Facts set out at page 495 of the Book of Exhibits.

(Testimony of Wallace B. Beggs.)

call: "a", Berkeley Steel Construction Co.; "b" Independent Iron Works.

Exhibit X-96*: Resolution of board of directors adopted April 16, 1937, awarding contract to Berkeley Steel Construction Co., for Schedule H.

Exhibit X-97*: Contract, Berkeley Steel Construction Co. with District, for Schedule H.

Exhibit X-98*: Bond for faithful performance, Schedule H.

Exhibit X-99*: Resolution of board of directors adopted April 30, 1937, approving bond for faithful performance, Schedule H.

Exhibit X-100*: Bond securing material men and laborers, Schedule H.

Exhibit X-101*: Resolution of Board of Directors adopted April 30, 1937, approving bond securing material men and laborers, [2076] Schedule H.

Exhibit X-102*: Resolution of acceptance of Schedule H, and final estimate.

Exhibit X-103: Certificate of completion of project, of Earl Lee Kelly, Director of Department of Public Works of the State of California, dated November 30, 1937.

DEFENDANT'S EXHIBIT X-103

CERTIFICATE OF COMPLETION

I, Earl Lee Kelly, Director of Public Works

*See Agreed Statement of Facts set out at page 495 of the Book of Exhibits.

(Testimony of Wallace B. Boggs.)

of the State of California, upon recommendation of the State Highway Engineer, do hereby certify that the project of Joint Highway District No. 13 of the State of California, including a highway, highway tunnels and approaches with appurtenant structures, located partly in the City of Oakland, County of Alameda, State of California, and partly in the County of Contra Costa, State of California, all in said Joint Highway District No. 13 of the State of California, the westerly terminus of said project being located at a point near the intersection of Broadway with Keith Avenue in the said City of Oakland, and the easterly terminus of said project being located at a point on the State Highway in Contra Costa County approximately fourteen hundred feet northerly from the intersection of the Fish Ranch Road with said State Highway, which is commonly known as and called the "Tunnel Road", has been fully constructed, improved and completed in accordance with the plans and specifications therefor heretofore adopted by the Board of Directors of said District on the 30th day of March, 1933, and the amendments and supplements thereto adopted by said Board of Directors on the 9th day of January, 1934, on the 3rd day of April, 1934, and the 23rd day of September, 1936, made by Wallace B. Boggs,

(Testimony of Wallace B. Boggs.)

District Engineer, all of which said plans and specifications were approved by me.

In Witness Whereof, I have executed this certificate of completion, this 30th day of November, 1937.

[Seal] (signed) EARL LEE KELLY,

Director of Public Works
of the State of California.

[Endorsed]: Filed December 1, 1937. Harry M. Stow, Secretary, Joint Highway District No. 13 of the State of California.

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 20101-R. Deft's. Ex. X-103. Filed June 1, 1938. Walter B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

I may state, with respect to that, your Honor, that under the rule where the state contributes, the road cannot be opened to use until such a certificate is given.

X-104 is a letter from C. H. Sweetser, Bureau of Public Roads, with respect to the completion of Schedules A and B.

2482

Six Companies of California vs.

(Testimony of Wallace B. Boggs.)

DEFENDANT'S EXHIBIT X-104

United States Department of Agriculture

Bureau of Public Roads

District Two

**Federal Office Bldg.,
Civic Center,
San Francisco, Calif.**

Arizona, California, Nevada

483 Calif. 2231 (Broadway Tunnel)

Schedule A and B

Received: June 22, 1937

J. H. D. #13

June 21, 1937.

Mr. Wallace B. Boggs

District Engineer

Joint Highway District 13

1448 Webster Street

Oakland, California

Dear Sir:

Reference is made to your letter of June 18, 1937, relative to your intention to recommend acceptance of Schedule A and Schedule B of U. S. Public Works Project, Docket California 2231, Broadway Tunnel at the meeting of the Board of Directors of Joint Highway District No. 13 on Tuesday, June 22, 1937.

Insofar as the Bureau of Public Roads is

(Testimony of Wallace B. Boggs.)

concerned it will be satisfactory for you to recommend acceptance of these schedules.

Yours very truly,

C. H. SWEETSER,

District Engineer.

By (Signed) CHAS. C. MORRIS,

Senior Highway Engineer.

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 20101-R. Deft's. Ex. X-104. Filed June 1, 1938. Walter B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

X-105 is a similar letter, with respect to another schedule.

DEFENDANT'S EXHIBIT X-105

United States Department of Agriculture
Bureau of Public Roads
District Two

Federal Office Bldg.,
Civic Center,
San Francisco, Calif.

Arizona, California, Nevada
483 Calif. 2231

Received: December 2, 1937

J. H. D. #13

December 1, 1937.

Mr. Wallace B. Boggs

District Engineer

Joint Highway District # 13

1448 Webster Street

Oakland, California

(Testimony of Wallace B. Boggs.)

Dear Sir:

It will be satisfactory for you to accept the work done under Schedules C, D and E of the Broadway Low Level Tunnel, P.W.A. Docket California 2231, as of this date.

This confirms the verbal acceptance given by telephone.

Yours very truly,

C. H. SWEETSER,

District Engineer.

By (Signed) LEVANT BROWN,

Senior Highway Engineer.

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 20101-R. Deft's. Ex. X-105. Filed June 1, 1938. Walter B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

X-106 is a similar letter, with respect to another schedule.

DEFENDANT'S EXHIBIT X-106

United States Department of Agriculture
Bureau of Public Roads
District No. 2

Federal Office Bldg.,

In your reply please
refer to file No.

Civic Center,
San Francisco, Calif.

483 Calif. 2231

Received: Sept. 10, 1937

J. H. D. #13

(Testimony of Wallace B. Boggs.)

September 7, 1937.

Mr. Wallace B. Boggs
District Engineer
Joint Highway District # 13
1448 Webster Street
Oakland, California

Dear Mr. Boggs:

Final inspection of Schedule F, Furnishing and Installing Carbon Monoxide Detectors and Recorders, for the Broadway Low-Level Tunnel, PWA Docket 2231, was made today.

Insofar as the Bureau of Public Roads is concerned, it will be satisfactory for you to recommend acceptance of this contract.

Very truly yours,
(Signed) C. H. SWEETSER,
District Engineer.

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 20101-R. Deft's. Ex. X-106. Filed June 1, 1938. Walter B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

X-107 is a similar letter, with respect to two other schedules.

(Testimony of Wallace B. Boggs.)

DEFENDANT'S EXHIBIT X-107

United States Department of Agriculture
Bureau of Public Roads
District Two

Federal Office Bldg.,
Civic Center,
San Francisco, Calif.

Arizona, California, Nevada
483 Calif. 2231

Received: November 9, 1937

J. H. D. #13

November 8, 1937.

Mr. W. B. Boggs,
District Engineer
Joint Highway District # 13
1448 Webster Street
Oakland, California

Dear Sir:

Schedule G of the Broadway Low-Level Tunnel, P.W.A. Docket California 2231, was inspected today by a representative of this office, and found satisfactory.

I concur in your recommendation for the acceptance of this contract.

Yours very truly,

C. H. SWEETSER,

District Engineer.

By (Signed) CHAS. C. MORRIS,

Senior Highway Engineer.

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[Endorsed]: U. S. Dist. Ct. N. D. Cal. No.
101-R. Deft's. Ex. X-107. Filed June 1, 1938.
Walter B. Maling, Clerk, by J. A. Schaertzer,
Deputy Clerk.

08 is a similar letter, with respect to two
schedules.

DEFENDANT'S EXHIBIT X-108

United States Department of Agriculture
Bureau of Public Roads
District Two

Federal Office Bldg.,
Civic Center,
San Francisco, Calif.

Arizona, California, Nevada

Received: Sept. 22, 1937

J. H. D. #13

3 Calif. 2231

September 22, 1937.

r. W. B. Boggs

District Engineer

Joint Highway District No. 13

48 Webster Street

Oakland, California

Dear Sir:

Schedule H of the Broadway Low Level Tun-
nel has been inspected and found satisfactory.
Insofar as the Bureau of Public Roads is

(Testimony of Wallace B. Boggs.)

concerned, this contract may be accepted as soon as you desire.

Very truly yours,

C. H. SWEETSER,

District Engineer.

By (Signed) CHAS. C. MORRIS,

Senior Highway Engineer.

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 20101-R. Deft's. Ex. X-108. Filed June 1, 1938. Walter B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

Those are all the exhibits included in this offer.

Mr. Smith: To the offer of those exhibits, we make the same objection that we heretofore made to the offer of the separate exhibits just introduced and admitted by your Honor before, and, in addition to the objection made at that time, we desire to add, because it now appears from the evidence offered that the work was broken up into separate schedules and relet upon several of these contracts, as I understand it, eight in number, which, in our opinion,—and we believe the law fully supports us,—is an improper practice because, according to the statement of counsel themselves, they had a right to do one of two things: they either had a right to call for bids and, failing to get bids, to do the work themselves; that was the statement he made yesterday.

Mr. Wittschen: No. [2077]

(Testimony of Wallace B. Boggs.)

Mr. Smith: In other words, he stated they could not do the work themselves because the Act obligated them to do the work by letting to the lowest bidder and, having attempted to let it to the lowest bidder, and not having received a bid, the other alternative which he stated was the right that they had in order to complete the work probably immediately came into action, namely, that they would have to do the work with their own forces, instead of which, from the evidence, they obviously decided to split the work up to suit themselves; and to all of this we object that it is not proper under the contract, because they were limited to the methods prescribed by Article V, or by the law as he stated it himself.

Mr. Wittschen: May I make a correction? You just stated the law. I said that, if bids came in that were too high, they could be rejected. I merely want to correct Mr. Smith's misapprehension of the District's organic act, so there will be no misunderstanding. If bids came in, the District might reject them if too high, and do the work with their own forces; but the Act is silent with respect to that right if no bid were received.

Mr. Smith: That is what I thought you had said. It seems to me self-evident that if they rejected a bid and receiving no bid they are in the same situation as if they rejected a bid. I can see no difference between receiving a bid which you reject and receiving no bid. They received a bid

(Testimony of Wallace B. Boggs.)
and they rejected it, and do it with their own forces; that is the very point we have in mind. That interpretation which he just made, I add as a ground for objection.

Mr. Wittschen: I don't want to argue it; but we don't make the law.

Mr. Smith: I think one thing is equal to the other. [2078]

Mr. Alexander: On behalf of the cross-defendant surety companies I make the same objection in all details and all particulars that was made by Mr. Smith. In view of the little colloquy that has taken place I would like to recapitulate what the objections have been, namely, we object to the introduction of this evidence on the ground that it is irrelevant and immaterial, that no cause of action was stated in the cross-complaint, that the cross-complaint was prematurely filed, and before the amount of the expense was determined as provided in Article V of the contract, and in section 6(q) subsections 1, 2 and 3 of the specifications; that the cross-complaint, for the reasonable cost of completion, is not justified by the express terms of the contract, that it was incumbent upon the district under the contract, Article V thereof, to complete with its own labor and not to arrange for the completion of it by a contract; that there has been a breach of the contract in that this District did not complete the contract, either by its own labor or by

(Testimony of Wallace B. Boggs.)
a contract, but split up a lot of incomplected work
in eight separate contracts.

The Court: The objection will be overruled.

Mr. Smith: Exception.

Mr. Alexander: We also except.

Mr. Tinning: I think before I started this omnibus offer that I had handed Mr. Boggs, for the purpose of this record, a summary of amounts that had been paid by the District on each of the contracts.

Q. Mr. Boggs, have you before you a schedule showing the total amount paid for completing the project under the contract, Schedules A, B, C, D, E, F, G, and H? A. Yes.

Mr. Alexander: May the answer go out just for a moment?

The Court: Yes.

Mr. Alexander: To which we make the same objection, your Honor.

Mr. Wittschen: He has only answered he has it before him. [2079]

Mr. Alexander: We make the same objection.

The Court: The objection is overruled.

Mr. Alexander: We note an exception.

Mr. Smith: Note an exception.

A. Yes.

Mr. Tinning: Q. Were the amounts paid by the District to the contractors under the various schedule as set forth on this sheet that you have?

A. Yes.

Mr. Alexander: May that answer go out?

(Testimony of Wallace B. Boggs.)

The Court: It goes out.

Mr. Alexander: We make the same objection.

Mr. Smith: We make the same objection.

The Court: The same ruling.

Mr. Alexander: And we note an exception, your Honor.

Mr. Smith: We also note an exception.

Mr. Wittschen: Might I ask a question: Your objection does not run that that is a summary of those costs?

Mr. Alexander: No, it does not.

A. Yes.

Mr. Tinning: Q. Was the total amount paid by the District for the contract under the eight schedules listed the sum of \$1,751,611.74?

Mr. Alexander: We make the same objection, your Honor.

Mr. Smith: So do we.

The Court: The same ruling.

Mr. Smith: We note an exception.

Mr. Alexander: We note an exception.

A. Yes.

Mr. Tinning: Gentlemen, I think for the sake of the record, probably it will shorten the matter, it would be wise to offer this in evidence. [2080]

Mr. Smith: I think so, too.

Mr. Tinning: We offer then as Defendant's Exhibit X-109 the schedule of payments made under the various contracts to complete the project.

Mr. Smith: Would you add to your offer that X-109 is a document which the witness Boggs had

(Testimony of Wallace B. Boggs.)

in his hand when you asked him the last three or four questions?

Mr. Tinning: Yes.

Mr. Alexander: To which we make the same objection.

The Court: The same ruling.

Mr. Alexander: Exception.

Mr. Smith: We join in the objection and exception.

(The document was marked "Defendant's Exhibit X-109.")

DEFENDANT'S EXHIBIT X-109

Schedule of Total Amounts Paid for Completing Project Under Contracts for Schedules "A", "B", "C", "D", "E", "F", "G" and "H".

Schedule "A"	\$736,551.18
Schedule "B"	21,511.36
Schedule "C"	426,262.02
Schedule "D"	43,460.00
Schedule "E"	269,800.00
Schedule "F"	18,893.00
Schedule "G"	216,062.36
Schedule "H"	19,071.82
Total	\$1,751,611.74

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 20101-R. Deft's. Ex. X-109. Filed June 1, 1938.

(Testimony of Wallace B. Boggs.)

Walter B. Maling, Clerk, by J. A. Schaertzer,
Deputy Clerk.

Mr. Tinning: This schedule is a credit that we discovered Six Companies entitled to. I don't know whether they are going to object or not.

Q. Mr. Boggs, I have just handed you a schedule purporting to show certain items for which credit should be allowed to the Six Companies, apparently for work which was not allowed under any estimate because it had not been completed at the time when any estimate was made, but had been partly completed under the contract, no allowance had been made and since this case the work has been completed and you have had an opportunity to go over your books, the District's books, these matters have been discovered, so you have prepared this tabulation. It is in addition to any credits that were allowed in the original cross-complaint and answer filed: that is correct, is it not? A. Yes

Q. That was preliminary. Mr. Boggs, is this schedule an accurate listing of all the work which was done by Six Companies and for which no allowance was made on any estimate?

Mr. Smith: You asked if it was an accurate statement. [2081]

A. Yes.

Mr. Alexander: I think, in order to avoid any confusion, we will make the same objection on all of the grounds.

(Testimony of Wallace B. Boggs.)

The Court: The same ruling.

Mr. Alexander: Exception.

Mr. Smith: He only testified it was a correct statement.

Mr. Tinning: Q. Is this amount, \$2806.55 an amount which should be credited to Six Companies?

Mr. Smith: I object to the question on the same grounds as previously stated.

Mr. Alexander: We make the same objection.

The Court: Overruled.

Mr. Smith: Note an exception.

Mr. Alexander: Note an exception.

A. Yes.

Mr. Tinning: We offer this schedule in evidence as Defendant's Exhibit X-110, it being the same document which the witness has just testified to.

Mr. Alexander: We object to that on the same grounds.

The Court: The same ruling.

Mr. Alexander: Exception.

Mr. Smith: We join in both the objection and exception.

(The document was marked "Defendant's Exhibit X-110.")

DEFENDANT'S EXHIBIT X-110

SCHEDULE SHOWING AMOUNTS WITHHELD FROM SIX COMPANIES OF CALIFORNIA AND NOT APPEARING IN ANY ENGINEERS' ESTIMATE UNDER CONTRACT DATED JUNE 4, 1934, FOR UNITS OF WORK PARTLY PERFORMED BUT NOT COMPLETED.

No.	Item	Quantities	Contract Prices	Amounts at Contract Prices
3	Structural Excavation, Class "A" _____	400 cu. yds.	@ \$1.20	\$ 480.00
5	Shoulders _____	1,780 sq. ft.	@ 0.035	62.30
7	Structural Steel _____	6,931 lbs.	@ 0.05	346.55
8	Concrete Structures, Class "A" Concrete _____	25 cu. yds.	@ 15.50	387.50
13	Penetration Oil Macadam Pavement _____	8,762 sq. ft.	@ 0.14	1,226.68
17	Concrete Gutters _____	54.1 sq. ft.	@ 0.25	13.52
43	Guard Rail _____	100 Lin. ft.	@ 0.80	80.00
44	Pipe Hand Rail _____	70 lin. ft.	@ 3.00	210.00
Total				\$2,806.55

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 20101-R. Deft's. Ex. X-110. Filed June 1, 1938.
Walter B. Maling, Clerk, by J. A. Schaertzer,
Deputy Clerk.

Mr. Tinning: Q. Mr. Boggs, I hand you a schedule which purports to be a computation of some costs of the construction of the project based on the unit prices set forth in the June 4, 1934, contract between Six Companies of California and Joint Highway District No. 13, and the units of

(Testimony of Wallace B. Boggs.)

work performed under all other contracts. The purpose of this exhibit, Mr. Alexander, is to arrive at the figure which would have been paid to the Six Companies of California if [2082] the quantities of work that were actually performed were completed. The contract price was on an estimated quantity as it was set up, and this tabulation shows the actual units of work which were performed, both by Six Companies and the people who followed them on the work, for the purpose of arrival at a figure as to what Six Companies would have been entitled to under their contract if they completed all of the units and the quantities of work this table has been worked out. Mr. Boggs, does the figure appearing at the bottom of this schedule, \$3,671,785.95 correctly represent the amount that would have been paid to Six Companies of California had they completed the work under the contract and done the units of work that were actually performed by them and all of the other contractors in the completion of the project of the District?

Mr. Smith: We object for all of the reasons stated previously.

Mr. Alexander: We make the same objection, your Honor.

The Court: For the purpose of the record the objection will be overruled.

Mr. Alexander: We note an exception.

Mr. Smith: We also note an exception.

(Testimony of Wallace B. Boggs.)

A. Yes.

Mr. Tinning: Q. That is the amount that would have been received by Six Companies if it had done all of the work at contract prices that was actually performed, both by itself and the other contractors?

Mr. Alexander: We make the same objection.

Mr. Smith: The same objection.

The Court: The same ruling.

Mr. Smith: Exception.

Mr. Alexander: Exception.

A. Yes. [2083]

Mr. Tinning: We offer this schedule in evidence as Defendant's Exhibit X-111.

Mr. Alexander: We make the same objection.

The Court: The same ruling.

Mr. Alexander: Exception.

Mr. Smith: We join in the objection and exception.

(The document was marked "Defendant's Exhibit X-111.")

[Set forth in the Book of Exhibits at page 580.]

Mr. Tinning: Q. Mr. Boggs, I hand you now a schedule which is apparently a computation of the amount claimed by Joint Highway District No. 13 of the State of California from Six Companies of California for the completion of the project, which is a tabulation of the claims of the District, is it not, and how it is computed—this is a preliminary question.

A. Yes.

(Testimony of Wallace B. Boggs.)

Q. Does this tabulation correctly show the balance paid by the District for the completion of this project and the amount claimed by the District for excess cost of construction?

Mr. Smith: Just a moment, I object to that question on the same grounds previously stated and each and all of them.

Mr. Alexander: We make the same objection.

The Court: The objection is overruled.

Mr. Smith: Exception.

Mr. Alexander: I note an exception.

Mr. Tinning: We offer in evidence the schedule showing the balance claimed by the District from Six Companies under the cross-complaint for the excess cost of construction in the sum of \$108,066.31, and ask that it be marked Defendant's Exhibit X-112.

Mr. Alexander: We make the same objection.

The Court: The same ruling.

Mr. Alexander: Exception.

Mr. Smith: We join in the objection and exception. [2084]

(The document was marked "Defendant's Exhibit X-112.")

DEFENDANT'S EXHIBIT X-112

Schedule, Computation of Amount Claimed by
Joint Highway District No. 13 of the State
of California from Six Companies of Cali-
fornia, for Completion of the Project.

Amount earned by Six Companies
of California

(Estimate No. 25)\$2,511,499.72

Amount paid to Contractors by

District under Contracts for

Schedules "A", "B", "C",

"D", "E", "F", "G" and "H" 1,751,611.74

Total under all Contracts\$4,263,111.46

Credit to Six Companies of Cali-

fornia for retained percentage

and checks returned to District ...\$ 480,452.61

Credit incomplete work not al-

lowed on Six Companies of

California estimates 2,806.55

Total paid by District under

all Contracts\$3,779,852.30

Computed Construction Cost at

Six Companies of California

contract prices 3,671,785.99

Balance claimed by District from

Six Companies of California

for cost of construction\$ 108,066.31

(Testimony of Wallace B. Boggs.)

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 20101-R. Deft's. Ex. X-112. Filed June 1, 1938. Walter B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

Mr. Smith: Might I make a point that has been suggested to me by my associate, in order that there be no question about it in the record we desire to add to our objection to this line of testimony that so far, and particularly the last exhibit offered, that the same is at variance with the allegations of the cross-complaint, and not receivable for that reason.

Mr. Alexander: We add the same objection.

The Court: Let me follow that, that it is in variance with the allegations of the cross-complaint?

Mr. Smith: As to the amount.

Mr. Tinning: As to the amount, that is true.

Mr. Wittschen: That is what I want to correct to conform to the proof. We have alleged it in here at \$69,000 and now we put it in \$108,000 and we intend to correct the figures.

The Court: It would be well to amend it now for the purpose of the record.

Mr. Smith: We shall object to any attempt to amend the pleadings at this time on all reasons we have previously stated, and on the ground that it is an improper variance and also not in keeping with the allegations.

Mr. Alexander: We make the same objection.

(Testimony of Wallace B. Boggs.)

Mr. Wittschen: The only variance ~~that~~ there is is a difference in figures, because the figures in the cross-complaint were gotten up before the work was completed, and that is not a variance, it is just a change from one figure to another; these figures occur probably a dozen times in various items in the counter-claim and in the cross-complaint and if you would like at this time I will move to amend the pleadings in the particulars that I have specified; I have already shown them to counsel and they have got it on their copies, so they are not surprised. Shall I go through the cross- [2085] complaint and read into the record the changes we want?

The Court: If you can agree on a memorandum you have gotten up——

Mr. Wittschen: It is not a memorandum. We just changed it on the face of the pleading.

The Court: Just so it is covered.

Mr. Smith: There are many objections to it. One, of course, is they have a verified cross-complaint and verified answer and counter-claim and they are changing figures ad lib and raising the amount thereof some \$40,000, and I do not see how a verification on that kind of a document can stand.

The Court: His explanation for that is that this work was discovered after he obtained the files; nothing else was done under the circumstances.

Mr. Smith: But a man cannot offer an affidavit to a pleading like that.

(Testimony of Wallace B. Boggs.)

The Court: Not always, but under the circumstances here I have no doubt that he can.

Mr. Wittschen: Might I suggest to your Honor that we are not trying to do anything——

The Court: I understand, I want to give the other side an opportunity to object.

Mr. Wittschen: I think their last objection that there is a variance is not well taken, because certainly you can prove the amount of your damage and then amend to conform to the proof. Perhaps that amendment ought to take the form of a new verification; if counsel is getting that technical we will get it for him.

The Court: My thought is you might not if it was a greater sum; of course, there would be no difficulty about it as long as it is a less amount than the prayer of your complaint. [2086]

Mr. Wittschen: We have increased it.

The Court: I want to give the other side a full opportunity, that is all I had in mind.

Mr. Wittschen: On page 19 we allege the State of California had contributed to the project \$600,000. Now we want to change that to \$700,000, which is the proof. Undoubtedly nobody could be hurt by that change.

Mr. Smith: We are not talking about that particular item.

Mr. Wittschen: In some cases we have given credit and in some cases we have made debits.

The Court: In any event the amount is definite?

(Testimony of Wallace B. Boggs.)

Mr. Wittschen: Yes, and they conform to proof that will come in. There are two ways to do it. One is to let the proof go in and amend the pleadings to conform to the proof, and the other to amend it on its face. Mr. Tinning is an officer of the District, and he says he can initial the changes or, if your Honor thinks that it requires verification, we can have the Secretary.

The Court: There is no question about that.

Mr. Smith: I do not doubt for a minute they could get people to re-verify it, but I am making the point that the amendment is of such a character that it raises the prayer of their complaint, and one of the reasons the law hedges around—

The Court: That is one of the reasons I suggested the amendment now before the proof goes in.

Mr. Wittschen: May I do that, read it into the record, the changes that we wish to make, so that nobody will be surprised?

Mr. Smith: Is your Honor allowing it to be done?

Mr. Wittschen: He has not heard what it is yet.

The Court: I have not heard what it is. Indicate for the record the purpose of your offer. [2087]

Mr. Wittschen: It is our purpose to amend the cross-complaint by taking out certain figures that are contained therein and substituting in lieu thereof figures which I will read. The reasons for that are that the cross-complaint was filed before the project had been completed and before the

(Testimony of Wallace B. Boggs.)

actual cost of various matters had been accurately ascertained and these amendments are offered to conform to what we will now prove.

On page 19, line 17, strike out the figures \$600,000 and insert in lieu thereof \$700,000.

On page 20, line 29, strike out the figures \$49,024.65 and insert in lieu thereof \$47,944.33.

On page 21, line 1, strike out the figures \$4467.08 and insert in lieu thereof the figures \$5,134.22, and in each case all of these figures are to be preceded by a dollar sign.

On line 5 strike out the figures \$1300 and insert in lieu thereof \$1862.45.

The same page, line 14, strike out the figures \$8150 and insert in lieu thereof \$14,060.85.

On line 16, same page, strike out the figures \$62,941.73 and insert in lieu thereof the figures \$69,001.85.

On page 22, line 4—this is the insertion of several words, because we are allowing that credit of \$2,806.55 that was mentioned by the witness—after the figures 1936 insert the words “As per estimate.”

Line 5, same page, after the word “to” insert the words “also a credit for plaintiff of \$2806.55 for partly performed work.”

Same line, same page, strike out the words “\$490,452.61” and insert in lieu thereof the figures “\$493,259.16.”

After the period at the end of line 5, change the period to a comma and insert the words “less \$10,-

(Testimony of Wallace B. Boggs.)

000 liquidated damages retained [2088] by defendant." The explanation of that is that we had charged that twice and that is to correct that.

On line 8, page 22, strike out the figures "\$1,725,000" and insert in lieu thereof "\$1,751,611.74".

On line 11, same page, strike out the figures "\$552,568.72" and insert in lieu thereof "\$579,180.46."

Line 12, same page strike out the figures "\$490,452.61" and insert in lieu thereof the figures "\$483,259.16." Immediately after those figures insert parenthesis before the word "the".

Line 14, insert the words after the word "contract," "less liquidated damages of \$10,000 retained," with a parentheses.

Line 14, strike out the figures "\$62,116.11" and insert in lieu thereof "\$108,066.31."

That is all in the counter-claim.

We now come to page 25, line 27, strike out the figures "\$82,000" and insert in lieu thereof "\$89,832.67."

Page 26, line 2, strike out the figures "\$62,914.73" and insert in lieu thereof "\$69,001.85."

Line 6, same page, strike out the figures "\$62,116.11" and insert in lieu thereof, "\$108,066.31."

Line 9, same page, strike out "\$216,500" and insert in lieu thereof "\$206,500." That is to take care of the \$10,000 penalty and reduces the claim \$10,000.

(Testimony of Wallace B. Boggs.)

Line 11, strike out the figures "\$341,557.84" and insert in lieu thereof the figures "\$383,568.16."

Page 33, line 11, strike out the figures "\$49,024.65" and insert in lieu thereof "\$47,944.33."

Line 14, same page, strike out the figures "\$4,467.08" and insert in lieu thereof the figures "\$5,134.22."

Line 18, same page, strike out the figures "\$1300" and insert in [2089] lieu thereof the figures "\$1,862.45."

Line 27, same page, strike out the figures "\$8150" and insert in lieu thereof "\$14,060.85."

Line 29, same page, strike out the figures "\$62,941.73" and insert in lieu thereof the figures "\$69,001.85."

On line 17, page 34, after the figures "1936" insert the words "as per estimate."

On line 19, after the word "to" insert the phrase "also a credit for plaintiff of \$2806.55, for partly performed work."

Line 19, strike out the figures "\$490,452.61" and insert in lieu thereof the following figures and phrase: "\$493,259.16, less liquidated damages \$10,000 retained by defendant."

Line 22, page 34, strike out the figures "\$1,725,000" and insert in lieu thereof "\$1,751,611.74."

Line 25, on same page, strike out the figures "\$552,568.72" and insert in lieu thereof the figures "\$579,180.46."

(Testimony of Wallace B. Boggs.)

Line 26, same page, strike out the figures "\$490,-452.61" and insert in lieu thereof the figures "\$483,-259.16."

After those figures on line 26 insert a parenthesis before the word "the".

On line 28, after the word "contract" insert the words "less liquidated damages of \$10,000 retained" and close with a parenthesis.

Line 28, same page, strike out the figures "\$62,-116.11" and insert in lieu thereof "\$108,066.31."

On page 37, line 29, strike out the figures "\$288" and insert in lieu the figures "\$272.89."

On page 38, line 9, strike out the figures "\$82,-000" and insert in lieu thereof, "\$89,832.67."

Page 38, line 16, strike out the figures "\$62,-941.73" and insert in lieu thereof the figures "\$69,-001.85."

Line 18, same page, strike out the figures "\$62,-116.11" and in- [2090] sert in lieu thereof the figures "\$108,066.31."

Line 22 of the same page, strike out the figures "\$216,500" and insert in lieu thereof the figures "\$206,500."

Line 24, same page, strike out the figures "\$341,-557.84" and insert in lieu thereof, "\$383,568.16."

Last page, page 39, first line, strike out the figures "\$341,557.84" and insert in lieu thereof "\$383,-568.16."

The same page, line 6, strike out the figures "\$341,557.84" and insert in lieu thereof the figures "383,568.16."

(Testimony of Wallace B. Boggs.)

It is understood that all of the figures refer to dollars and cents and all of the amounts are to be preceded by a dollar sign. We now ask, if your Honor please, that our cross-complaint may be amended in the particulars specified in order that the amounts therein originally stated may be changed to the new amounts in order to conform to proof which we will now offer, and that I may make these changes on the original complaint and have them initialed by the clerk.

Mr. Smith: To which we object for the reasons already stated.

Mr. Wittschen: Might I ask do you waive the necessity of our having the re-verification, or do you stand on that?

Mr. Smith: As far as I am concerned I do not think it would add anything. I notice that the man that verified it is dead.

Mr. Wittschen: Don't you think we could have another secretary verify it? As a matter of fact, a public body does not have to verify it.

Mr. Smith: I just mentioned that to show what bad practice it is.

Mr. Alexander: We join in the objection.

The Court: The objection will be overruled.

Mr. Alexander: We note an exception.

Mr. Smith: We note an exception. [2091]

Mr. Alexander: We have here a new complaint radically different, different to the extent of some \$42,000, and I think something should be said or

(Testimony of Wallace B. Boggs.)

done to protect the rights of the various cross-defendants. They have put in new figures.

Mr. Smith: How about our answers?

Mr. Wittschen: Your answers may be deemed a denial without further changing your pleadings. You have denied them, anyway.

Mr. Alexander: It is not sufficient that our answers be deemed a denial. We have many special defenses that we are entitled to urge to these as well as originally.

The Court: What is the point of your objection?

Mr. Alexander: The point is this, they have here what is an amended cross-complaint.

The Court: Yes.

Mr. Alexander: Which they have just put in. We have to have a pleading to it, and I think that new matters should be denied and all of the matters urged in our answers should be deemed pleaded to this cross-complaint as amended.

The Court: Would a denial cover it all?

Mr. Alexander: No, a denial would not. We have pleaded a lot of special defenses.

The Court: I am trying to be helpful to both sides here in getting this record up. Have you any suggestions?

Mr. Wittschen: I will stipulate, I thought I had, when Mr. Alexander interrupted me, when I said they might be deemed denied. I will stipulate that the answers as filed by the respective cross-defendants to the cross-complaint before these amendments

(Testimony of Wallace B. Boggs.)

were made may be deemed answers to the cross-complaint as amended.

Mr. Alexander: And that the new matters be deemed denied?

Mr. Wittschen: Yes.

The Court: Let the record so show. [2092]

Mr. Wittschen: May I have the original and make the changes so that the Clerk may initial them?

The Court: You may have it. Now proceed, gentlemen. [2093]

Mr. Alexander: If we can interrupt just a moment—maybe we have taken an exception,—I am not certain; but may the record show we have excepted?

The Court: Let the record show an exception.

Mr. Smith: If there are not enough in there already, I will add one myself.

Mr. Tinning: Q. Mr. Boggs, following your testimony of this morning—

The Court: I think, when the new rules come out, about September, there will be a rule covering it, so this nuisance will be at an end.

(Discussion, off record.)

Mr. Tinning: Q. During the period from June 13, 1936, to and including the 9th of November, 1936, the date that the first new contract was let, to Pollock & Clifford, for the driving of the tunnel, did the District perform any work in the tunnels for the protection of the work?

(Testimony of Wallace B. Boggs.)

Mr. Smith: Just a minute. I make the same objection, your Honor, as made heretofore to this line of questioning.

Mr. Alexander: We join in the objection.

The Court: Overruled.

Mr. Smith: Exception.

Mr. Alexander: Exception.

The Witness: A. Yes.

Mr. Tinning: Q. What did this work include, Mr. Boggs?

Mr. Smith: Same objection.

The Court: Same ruling.

Mr. Alexander: Same objection.

Mr. Smith: Exception.

Mr. Alexander: Exception. [2094]

The Witness: A. This work performed by the District included the furnishing of materials and supplies and the performance of certain work.

Mr. Tinning: Q. What was the work; what did you do?

Mr. Smith: The same objection.

The Court: The same ruling.

Mr. Alexander: Same objection.

Mr. Smith: Exception.

Mr. Alexander: Exception.

The Witness: A. We placed concrete footings in the tunnel from the end of the concrete footings which had existed prior to the stoppage of work on June 13, 1936, and extended those footings to the face of the core excavation.

(Testimony of Wallace B. Boggs.)

Mr. Tinning: Q. Did you gunite the timber rings? A. The timbers—

Mr. Alexander: May I just ask that the objection go the entire line, or may I make a suggestion to Mr. Tinning which won't be a part of the record?

(Private discussion between Mr. Tinning and Mr. Alexander.)

Mr. Tinning: Q. Mr. Boggs, to try to shorten this up: It is a fact, is it not, that the District had to put in concrete footings for the purpose of maintaining the area where timbers were installed and concrete had not yet been placed; that guniting was done; that the timbers had to be maintained in the thousand or more feet of drifts that ran to the east portal; and that watchmen had to be employed, engineers had to be employed, in connection with this work that was being done there, so that the entire tunnel which was left on June 13th could be maintained without danger of falling down and caving in? A. Yes. [2095]

Mr. Alexander: Wait a minute.

Mr. Smith: The question is objected to on the same grounds as previously stated.

Mr. Alexander: We join in the objection.

The Court: Overruled.

Mr. Smith: Exception.

Mr. Alexander: Exception.

Mr. Tinning: Q. What was the cost of the work of protection and maintenance during the period referred to?

(Testimony of Wallace B. Boggs.)

Mr. Smith: Same objection.

Mr. Alexander: Same objection.

The Court: Same ruling.

Mr. Smith: Exception.

Mr. Alexander: Exception.

The Witness: A. \$47,944.33.

Mr. Tinning: Q. Did the District, in preparing the new specifications, have to make extensive measurements of the work that remained to be done and procure materials and supplies for doing that work, including preparation of blueprints and specifications?

Mr. Smith: Same objection, on the same grounds as previously urged.

Mr. Alexander: Same objection.

The Court: Same ruling.

Mr. Smith: Exception.

Mr. Alexander: Exception.

The Witness: A. Yes.

Mr. Tinning: Q. What was the cost of measuring the work and completing the specifications after the resumption of work?

Mr. Smith: Same objection.

Mr. Alexander: Same objection [2096]

The Court: The same ruling.

Mr. Smith: Exception.

Mr. Alexander: Exception.

The Witness: A. \$5,134.22.

Mr. Tinning: Q. Did the District readvertise for contracts to secure contractors to complete the work?

(Testimony of Wallace B. Boggs.)

Mr. Smith: Same objection; and, in addition, we object on the ground that the items in question could not be in any way charged against us as a cost of doing the work.

Mr. Alexander: Same objection.

The Court: Same ruling.

Mr. Smith: Exception.

Mr. Alexander: Exception.

The Witness: A. Yes.

Mr. Tinning: Q. What amount was paid by the District to readvertise the work?

Mr. Smith: Same objection.

Mr. Alexander: Same objection.

The Court: The same ruling.

Mr. Smith: Exception.

Mr. Alexander: Exception.

The Witness: A. \$1,862.45.

Mr. Tinning: Q. Did the District procure fire insurance, explosion insurance, liability insurance, fidelity insurance and Workmen's Compensation Insurance during the period mentioned?

Mr. Smith: Objected to on the same grounds.

Mr. Alexander: Same objection.

The Court: Same ruling.

Mr. Smith: Exception.

Mr. Alexander: Exception. [2097]

The Witness: A. Yes.

Mr. Tinning: Q. What was paid by the District for such insurance?

Mr. Smith: Same objection.

Mr. Alexander: Same objection.

(Testimony of Wallace B. Boggs.)

The Court: The same ruling.

Mr. Smith: Exception.

Mr. Alexander: Exception.

The Witness: A. \$14,060.85.

Mr. Tinning: Q. And the total cost of the items which I have just questioned you about is how much, Mr. Boggs?

Mr. Smith: Same objection.

Mr. Alexander: Same objection.

The Court: The same ruling.

Mr. Smith: Exception.

Mr. Alexander: Exception.

The Witness: A. \$69,001.85.

Mr. Tinning: Q. This document which you hold in your hand was prepared from the District's records by Mr. Ernest Brotherton, a certified public accountant who had been employed by the District to regularly audit the records from the time the District had any records, or at least from the time the work started? A. Yes.

Mr. Alexander: Same objection.

The Court: Same ruling.

Mr. Alexander: Exception.

The Witness: A. Yes.

Mr. Tinning: We offer the schedule which the witness has just been referring to in evidence as Defendant's Exhibit X-113.

Mr. Smith: To which I will object upon the reasons previously stated. [2098]

(Testimony of Wallace B. Boggs.)

Mr. Alexander: And we join in the objection.

The Court: Objection overruled.

Mr. Smith: Exception.

Mr. Alexander: Exception.

(Document marked "Defendant's Exhibit X-113.)

[Set forth in the Book of Exhibits at page 584.]

Mr. Tinning: Q. In addition to the work of protection which you have just referred to, Mr. Boggs, did the District maintain a staff, following the 24th day of May, 1936, up to and including the time that the work was actually finished?

The Court: Q. You may answer "Yes" or "No."

Mr. Smith: That is a preliminary question.

The Court: That is a preliminary question.

Mr. Smith: That is a preliminary question.

The Witness: A. Yes.

Mr. Tinning: Q. It is a fact, is it not, that under the provisions of the Joint Highway District Act when the project is finished that the jurisdiction of the District, or the power of the District, over the road ceases and it becomes a public highway subject to the county or the state, whoever has jurisdiction?

Mr. Smith: Before the witness answers, I will object to that question as calling for a legal opinion of the witness and calling purely for a conclusion of law.

Mr. Alexander: I join in the objection.

(Testimony of Wallace B. Boggs.)

Mr. Tinning: Your Honor, I think it is within the judicial knowledge of the Court that the Act provides that when the project is completed a certificate by the Director of the Department of Public Works is issued, and the jurisdiction over the road ceases in the District and belongs to the county.

The Court: Is that a fact, gentlemen?

Mr. Smith: Well, we won't concede that, your Honor.

Mr. Tinning: Well, the Act so specifies. [2099]

Mr. Smith: Whatever the law specifies, of course, is a matter of interpretation by the Court.

The Court: Just so we have a record on it.

Mr. Tinning: This is Section 32 of the Joint Highway District Act of 1931 under which this District functions (reading Section 32.)

Q. During the period following the 24th day of May, 1936, did the District continue to employ engineers, an office force, and maintain watchmen, and procure materials and supplies and expense for its operation?

Mr. Smith: I make the objection on all the grounds previously urged; and, in addition, I urge the further objection that the testimony sought to be elicited by the question would be proof or an attempted proof of damages which are speculative and not in any manner within the purview of any theory on which they might recover under this cross-complaint.

Mr. Alexander: We join in the objection.

(Testimony of Wallace B. Boggs.)

Mr. Tinning: The purpose of this offer, your Honor,—we have pleaded as one of the matters in this defense the penalty of \$500 per day. We are offering this line of testimony to show, for instance, what the daily cost of operation of the District was. We also expect to offer proof with respect to the bond interest, and also with respect to the loss to the public by the fact they were unable to use this tunnel during the certain period of time. Now, that proof simply goes to the point of the penalty being somewhere within striking distance of the actual loss incurred.

The Court: How is the Court going to measure that?

Mr. Tinning: I don't think the Court does, your Honor. I think, if we are entitled to a penalty, that the thing then is to determine the penalty itself is not unreasonable. [2100]

Mr. Smith: What did your Honor say? I did not hear your remark.

The Court: I inquired how the Court was going to determine any damage for the public using, or the failure to use, this tunnel. He answered that by saying it has to do with the penalty and the imposition of the penalty. The penalty itself is prescribed by—

Mr. Tinning: Yes, by that contract.

Mr. Smith: If they want to call it a penalty, let them accept that as his definition. The law in California provides you cannot enforce a penalty. I un-

(Testimony of Wallace B. Boggs.)

derstood the theory was they were trying to recover on the basis of liquidated damages. They have no right to recover any penalty. The law is as clear as a bell on that, particularly because penalties are absolutely proscribed under our California law. You cannot recover a penalty. The assertion is made, in their cross-complaint, that it is a claim for liquidated damages.

The Court: I think we are confused. I don't think he expects to go beyond the penalty clause here.

Mr. Tinning: We don't expect to go beyond the liquidated damage clause. What we are showing is: it is part of the contract and it is not an unreasonable provision, in view of the situation that exists.

The Court: If you have any argument about it, or any confusion about it, I will let it come in subject to a motion to strike and over the objection of counsel.

Mr. Smith: Exception.

Mr. Alexander: We note an exception.

Mr. Tinning: Q. What was the average cost per day, Mr. Boggs, for operating the District from May 25, 1936, to November 30, 1937?

Mr. Smith: Might I ask you a question, Mr. Tinning, for the [2101] purpose of clearing the record? Is November 30th the day when the project was completed?

Mr. Tinning: Yes.

Mr. Smith: And the work was completed?

Mr. Tinning: We checked out on the 30th.

(Testimony of Wallace B. Boggs.)

Mr. Smith: Your position is, for the record, that the project was completed on that day?

Mr. Tinning: Yes; and we have already stated that; we only expect to run until July 31st; but to give you your average we are taking the whole period.

Mr. Smith: I was interested in November 30th. So, we can consider that an admission by you that that was the date of completion?

The Court: When did you notify the state and county of the completion?

Mr. Tinning: I think, the workmen stopped there on the 1st of December.

Mr. Smith: Mr. Kelly's certificate which you offered in evidence here a while ago is dated November 30th.

Mr. Tinning: I think that is the date. The reason we had that transmitted, as I understand it, or as I remember it, was that November 30th was a Saturday, following Thanksgiving, and then we had to get Mr. Kelly's certificate and bring it down to the State Highway Commission meeting on the 3rd of December and get this thing taken over by the state so we could open it by the 5th, as a state project. Mr. Smith, I don't want to——

Mr. Smith: I just want to get that date.

Mr. Tinning: I think the date was that. It is not an admission, because I am not sure of that.

Mr. Smith: What date do you say it was completed? I would like [2102] to know.

(Testimony of Wallace B. Boggs.) ✓

Mr. Tinning: I think, as a matter of fact, that the actual date of completion of the project was the 30th day of November.

Mr. Smith: Well, that is satisfactory. I will accept that.

Mr. Tinning: That is my recollection.

The Court: He indicates that is the date you notified Kelly.

Mr. Smith: No; that is the date Kelly certified to them that he accepted it as a completed project, according to the statement.

Mr. Tinning: Has the objection been overruled?

The Court: Overruled.

Mr. Tinning: Q. What was the average cost per day? Did you answer the question?

A. \$272.899.

Mr. Smith: Another thing: we would like to object to the line of testimony, particularly on this exhibit; we have not had a chance to examine the details included therein, and we don't want any testimony in here without having a chance to——

The Court: The thought struck me a moment ago. That exhibit is available; you can supply them with copies?

Mr. Tinning: I have supplied them with copies. I suppose it goes in subject to check, if there is anything wrong.

Mr. Wittschen: Let us have an understanding: we did this at your suggestion; we don't want you to claim error when we put it in in this way by

(Testimony of Wallace B. Boggs.)

stipulation that we have done something we should not. You can have every opportunity to check. We are doing it along the lines by which you proved your case, with an understanding between us that, in any of these matters, you can go over them if you want to and make any corrections if there are any errors in them. That opportunity is always open to you. That is understood, isn't it?

Mr. Smith: Certainly.

Mr. Tinning: And Mr. Brotherton is in the room; I can put him [2103] on; but it will take a lot of time.

Mr. Smith: I am not trying to have you do that at all.

The Court: It is subject to any corrections hereafter that you desire to make.

Mr. Smith: It has been received subject to a motion to strike, anyway.

Mr. Alexander: No; it has not gone in yet.

Mr. Tinning: The testimony is; and I am just going to put the document in.

The Court: He is laying a foundation.

Mr. Tinning: Q. Mr. Boggs, that document that you have just been referring to is an audit of the District records, with respect to the items which you have just testified to, which was made by Mr. Brotherton, the same man who made the other statement that you have testified to? A. Yes.

Mr. Tinning: We offer in evidence, if the Court please, the document from which the witness has

(Testimony of Wallace B. Boggs.)

just been giving his testimony with respect to \$272.899 per day average cost of operating the District.

Mr. Smith: To which we make the same objection.

Mr. Alexander: We join in the objection.

The Court: Same ruling.

Mr. Alexander: Exception.

Mr. Smith: Exception.

(The document was marked "Defendant's Exhibit X-114.")

[Set forth in the Book of Exhibits at page 595.]

Mr. Tinning: Q. Mr. Boggs, has Mr. Brotherton made a computation of the cost per day for interest on the bonds of the District during the period from May 24, 1936 to July 31, 1937?

Mr. Smith: Well—that is a preliminary question? [2104]

Mr. Tinning: Yes.

Mr. Smith: Ask him to answer it "Yes" or "No," so we may make an objection.

The Witness: A. Yes.

Mr. Tinning: Q. I show you a table of interest calculations, Mr. Boggs. You have been over this before. This is the data that was prepared by Mr. Brotherton from the District records?

A. Yes.

Q. What was the amount of interest that was paid on the bonds of the District for the period from May 24, 1936, to June 13, 1936?

(Testimony of Wallace B. Boggs.)

Mr. Smith: Just a minute. We object upon all grounds previously stated and, in addition thereto, on the ground they would have to pay their interest on their bonds no matter what the situation was with regard to any construction work. They have put out their bond issues. The bonds contain a provision for payment of interest and the terms and conditions of the bond issue remain constant no matter what the situation may be with regard to any work they are doing or not. [2105]

Mr. Wittschen: Well, we did not have the use of the tunnel.

Mr. Smith: That would make no difference in the bonds whatever, because they do not depend on the use of the tunnel.

Mr. Tinning: It is a measure of the loss of the value to the public. You rent a house and you use it for a year, or you cannot use it for a year because of some difficulty, maybe the contractor is slow in finishing it for you if you are building a house, and you have to pay rent. That is certainly one of the elements——

The Court (Interrupting): The Court is prepared to rule.

Mr. Alexander: We want to join in the objection, your Honor.

Mr. Smith: We object on the ground it calls for guess-work, speculation, and the thinnest kind of proof as to the allegation of damages.

(Testimony of Wallace B. Boggs.)

The Court: This testimony will go in subject to the objection of counsel and subject to a motion to strike out.

Mr. Smith: Exception.

Mr. Alexander: Exception.

Mr. Tinning: Q. What was the amount of interest for the period from May 24th to June 13th, 1936, paid by the District on its bonds?

A. \$4,149.32.

Q. For the period from June 14th, 1936 to November 9th, 1936, what was the interest?

Mr. Smith: The same objection.

Mr. Alexander: The same objection.

The Court: The same ruling.

Mr. Alexander: Exception.

Mr. Smith: Exception.

A. \$30,912.40.

Mr. Tinning: Q. For the period from November 10, 1936 to July 31, 1937, what was it?

Mr. Smith: We make specifically the objection that was made to [2106] the first question upon this feature, and on the ground of objections specified in the other testimony on this line.

Mr. Alexander: We join in the objection.

The Court: I will allow it to come in as I have indicated, subject to a motion to strike and over the objection of counsel.

Mr. Smith: Exception.

The Court: That is the testimony on interest on the bond indebtedness.

(Testimony of Wallace B. Boggs.)

Mr. Tinning: Q. The total of the figures which you have here, Mr. Boggs, is \$89,832.68.

The Witness: Yes.

Mr. Tinning: We offer this tabulation in evidence, if the Court please, as Defendant and Cross-complainant's Exhibit in proper order.

Mr. Smith: Objected to upon the same grounds as hitherto stated.

Mr. Alexander: We join in the objection.

The Court: It will come in subject to the same ruling.

Mr. Alexander: Exception.

Mr. Smith: Exception.

(The document was marked "Defendant's Exhibit X-115.")

DEFENDANT'S EXHIBIT X-115

Joint Highway District No. 13 of the
State of California

Interest Calculations—Interest on Bonded Indebtedness

Interest becomes due and payable on the 2nd days of January and July of each year. Bonded redemptions made on the 2nd day of January of each year.

Interest from January 2, 1936 to January 2, 1937, amounts to \$75,725.00, or \$207.46575 per day.

(Testimony of Wallace B. Boggs.)

Interest from January 2, 1937 to
January 2, 1938, amounts to \$69,-
800.00, or \$191.23288 per day.

For 20 days—May 24, 1936 to June
13, 1936, the interest cost is..... \$ 4,149.32

For 149 days—June 14, 1936 to No-
vember 9, 1936, the cost is..... 30,912.4

For 264 days—November 10, 1936 to
July 31, 1937, the cost is..... 54,770.96

Total \$89,832.68

[Endorsed]: U. S. Dist. Ct. of N. D. Cal.
No. 20101-R. Deft's Ex. X-115. Filed June 1,
1938. Walter B. Maling, Clerk. By J. A.
Schaertzer, Deputy Clerk.

Mr. Tinning: Q. Mr. Boggs, it appears from
the tabulation that the interest per day from the
period January 2, 1936 to January 2, 1937, amounted
to \$202.46 per day.

Mr. Smith: Objected to on the ground the in-
terest appears on the tabulation. I object to it upon
that ground and the other grounds.

Mr. Alexander: The same objection.

The Court: Overruled.

Mr. Smith: Exception.

Mr. Alexander: Exception.

A. Yes.

Mr. Tinning: Q. From the period January 2,
1937 to January 2, [2107] 1938 the interest was
\$191.23 per day.

(Testimony of Wallace B. Boggs.)

Mr. Smith: The same objection.

Mr. Alexander: The same objection.

The Court: The same ruling.

Mr. Smith: Exception.

Mr. Alexander: Exception.

The Witness: A. Yes.

Mr. Smith: I take it those last two questions and answers were subject to your Honor's ruling that it is subject to a motion to strike?

The Court: Subject to a motion to strike, I indicated that before.

Mr. Tinning: Q. Mr. Boggs, do you know what the travel over the Tunnel Road, both ways, both east and west, was according to the traffic count taken by the State of California in the year 1936, the average daily traffic?

Mr. Smith: Just a minute. I will object to that on all the grounds previously stated, and as obviously calling for information which has about as much to do with this case as the amount of traffic, you might say, that went over the road between Salinas and Watsonville, or between Sacramento and Truckee, or any other place.

The Court: Well, I will give you time to argue that. I am allowing this testimony to come in over the objection of counsel and subject to a motion to strike.

Mr. Alexander: May we join in the objection, your Honor? Exception.

Mr. Smith: Exception.

(Testimony of Wallace B. Boggs.)

Mr. Wittschen: In showing liquidated damages you cannot do that without—you have to have a penalty to show——

Mr. Smith: Will it be stipulated there has never been any toll [2108] charged for the use of the highway?

Mr. Wittschen: Certainly.

Mr. Tinning: Well, it is a fact, but we can ask the witness.

Q. This is a free public highway, this tunnel was built by the District, Mr. Boggs? A. Yes.

Q. It is also true that the routes that existed prior to and now exist, that were used prior to the time this project, this Broadway Tunnel project was built, were all free public highways?

A. Yes.

Q. What was the average daily traffic?

Mr. Smith: Objected to on the same ground.

Mr. Tinning: Over the Tunnel Road to which the Broadway Tunnel was available, would it have been available to use if it had been completed in 1936?

Mr. Smith: Objected to further upon the ground it calls purely for a speculative conclusion of the witness. There is absolutely no basis for any witness in the world testifying whether anybody would have used it or not used it in 1936.

Mr. Alexander: I join in the objection.

Mr. Smith: It is pure guess-work.

(Testimony of Wallace B. Boggs.)

Mr. Wittschen: If a man travels upon the roads immediately adjacent to it—

The Court: You better develop the fact, then.

Mr. Tinning: We have a man here from the State, if counsel wants to go into that phase of it. I though Mr. Boggs could testify to it.

Mr. Smith: Well, you have some language in your question, would the traffic available have used this road.

Mr. Tinning: No, I did not say whether it would have used it. I said if it was available for use what traffic—

Mr. Smith: I think if you would read the question, I think it is vicious in its present form.

Mr. Tinning: Q. Mr. Boggs, what was the travel over the Tunnel [2109] Road in 1936 which used the routes that were then available for crossing the hills from Contra Costa County into Alameda County for which the Broadway Low Level Tunnel is a substitute, a present substitute?

Mr. Smith: Objected to upon the ground it assumes something not in evidence, calls for speculative conclusions of the witness, and upon all the grounds previously urged.

The Court: I will allow it to come in subject to a motion to strike.

Mr. Alexander: We join in the objection.

The Court: The objection will be overruled.

Mr. Alexander: Exception.

Mr. Smith: Exception.

(Testimony of Wallace B. Boggs.)

A. 1,911,870 vehicles annually.

Mr. Tinning: Q. That is based upon a daily average of how many? A. 5238.

Q. How much was the saving of distance by the Broadway Low Level Tunnels over the prior existing routes?

Mr. Smith: The same objection.

The Court: The same ruling.

Mr. Alexander: The same objection.

Mr. Smith: Exception.

Mr. Alexander: Exception.

A. An average of 2 miles.

Mr. Tinning: Q. What is the computed value, or cost of the use, or the loss by reason of the fact these 1,911,870 vehicles were unable to use the tunnel in 1936?

Mr. Smith: Objected to on all the grounds previously urged and also on the ground it calls for an opinion and conclusion of the witness, on a subject-matter which is one which is purely within the province of the Court to adjudge if the subject be at all proper [2110] to pass upon in this action; also upon the ground there is no foundation laid and no showing this witness has any knowledge of the subject.

The Court: If they insist on the foundation being laid it is better to do it, gentlemen.

Mr. Alexander: We join in the objection.

Mr. Tinning: Q. Mr. Boggs, as a part of your duties as engineer on this project you made traffic

(Testimony of Wallace B. Boggs.)

estimates upon which the Government or the State of California have acted? A. Yes.

Q. Were those traffic estimates based upon the counts taken by the State of California of vehicles over this route and other routes? A. Yes.

Q. Have those counts been taken annually or semi-annually by the State of California for several years last past?

A. Annually for the last two years and semi-annually prior to that.

Q. This is a state-wide count that was taken by the State? A. Yes.

Q. On this particular route, the Tunnel Road, were those counts taken during the same time the State was taking the other counts? A. Yes.

Q. Under the direction and control of what department, was it the Department of Public Works of the State of California? A. Yes.

The Court: We will conclude for the day, and since we made such rapid headway this afternoon I suggest you remain in session for the next half hour to see if there are not many other things that you can handle in as rapid a fashion as you did today. We will take a recess until tomorrow morning at ten o'clock.

(An adjournment was here taken until tomorrow, Thursday, June 2, 1938, at ten o'clock a. m.) [2111]

(Testimony of Wallace B. Boggs.)

Thursday, June 2, 1938;

10 O'Clock A. M.

WALLACE B. BOGGS,
recalled.

Direct Examination (Continued)

Mr. Tinning: Before we resume the line of questioning of yesterday afternoon, Mr. Boggs, I would like to ask you a question or two about Defendant's Exhibit 114. The schedule referred to is the schedule that was introduced yesterday, Mr. Boggs, to support the figures that you testified to: \$272.899 per day as the average cost of operating the District during the period May 25, 1936 to November 30, 1937. I would like to call your attention to the supporting schedules that are attached to this exhibit, and, for the purpose of this question, to the third page of those supporting schedules, which is headed "Description of Charge," and which column appears to contain a short description of the various items of expenditures which were made by the District for the District operation and which were not attributed or listed in the cost of maintenance and protection that were directly attributable under the District's claim to the Six Companies' cessation of work.

Q. Are all of the charges set forth, for example, some of the charges starting under Voucher No. 1085, "Insurance on Instruments, Plumb Bobs, Office Rent, May Expense," and, with respect to

(Testimony of Wallace B. Boggs.)

May expense, those are the travelling expenses of the various employees of the District which are allowed by the District to those employees during the period referred to; is that correct?

A. Yes.

Mr. Tinning: Just a moment before you answer the question.

Mr. Smith: Just ask a question first, so I can object.

Mr. Tinning: Q. Are those the travelling expenses of people—

Mr. Smith: If you are asking a question, I will object upon the reasons already stated: that the testimony is not admissible, on the same grounds urged yesterday in connection with this line of [2112] testimony concerning which your Honor ruled you would admit it subject to a motion to strike out.

Mr. Alexander: We join in the objection.

The Court: Overruled.

Mr. Smith: Exception.

Mr. Alexander: Exception.

The Witness A. Yes.

Mr. Tinning: Q. All of the items which are listed under "Description of Charges," all of the items set forth in this account, are items which you testified yesterday,—and I again ask you to wait for the answer until I finish,—which are listed in this schedule for the purpose of showing items which were necessary expenses of the District during the

(Testimony of Wallace B. Boggs.)

period it was necessary for the District to run, after Six Companies ceased operations on June 13, 1936 and up to November 30, 1937 when the work was completed?

Mr. Smith: Same objection.

Mr. Alexander: Same objection.

The Court: The objection will be overruled.

Mr. Smith: Exception.

Mr. Alexander: Exception.

The Witness: A. Yes.

Mr. Tinning: Q. Mr. Boggs, is the sum of \$272.899 the reasonable cost, in your opinion, for operating the District,—the average daily reasonable cost of operating the District, from the 25th day of May, 1936, to the 30th day of November, 1937?

Mr. Smith: To which we make the same objection.

Mr. Alexander: We join in the objection.

The Court: Overruled.

Mr. Smith: Exception.

Mr. Alexander: Exception.

The Witness: A. Yes, sir. [2113]

Mr. Tinning: If your Honor please, I am going to ask leave to add a few exhibits to those put in yesterday under the omnibus clause, in view of one of Mr. Smith's questions with respect to Mr. Kelly's certificate, and, in fairness to counsel, I will say that, before we knew that Mr. Alexander felt that he would have to take the position he has taken,—which we are not criticizing,—I had understood the

(Testimony of Wallace B. Boggs.)

key document would be satisfactory to these gentlemen. As it has developed there may be some question about that, I desire to put the supporting documents in with respect to the completion of the work, the documents which show the action of the District and the various officers, as required by the provisions of Section 32 of the Joint Highway District Act which I read yesterday.

I offer in evidence, as defendant's exhibit in proper order, the affidavit and certificate of the District Engineer that the Joint Highway District project is completed, which affidavit the record will show, from the exhibits put in yesterday, that Mr. Kelly's certificate was filed with the Director of the Department of Public Works of the State of California on the 30th day of November, 1937, the document now offered being the certificate and affidavit of the District Engineer dated November 29, 1937.

Mr. Smith: Will you add them all together in your offer at the same time, so we can make one objection?

Mr. Tinning: Yes. Counsel states a suggestion that we put in another small omnibus offer.

The Court: Put them in together.

Mr. Alexander: Mr. Tinning, we did not suggest you put them in.

Mr. Tinning: No; but, if they are offered, that is the way it is suggested they be offered.

Mr. Alexander: Yes.

(Testimony of Wallace B. Boggs.)

Mr. Tinning: We also offer the resolution of board of directors of Joint Highway District No. 13 of the State of California which [2114] recites the execution of the affidavit by the District Engineer with the State, the issuance and filing of the certificate with the Director of the Department of Public Works of the State of California dated November 30, 1937, which resolution certifies that the District project is completed in accordance with law, and which resolution was passed on the 1st day of December, 1937.

We also offer in evidence the certificate of C. E. Wade, County Clerk of the County of Alameda, certifying that a certified copy of the resolution of the board of directors of the Joint Highway District last referred to was filed by the Board of Supervisors of the County of Alameda on the 2nd day of December, 1937.

We also offer the certificate of S. P. Wells, County Clerk of the County of Contra Costa, certifying a certified copy of the resolution of the board of directors of the Joint Highway District that the job is complete, which resolution was filed on the 1st day of December, 1937, filed with the Contra Costa County Board of Supervisors on the 2nd day of December, 1937.

I ask that all these documents go in as one exhibit under the proper designation,—Defendant's Exhibit X-116.

(Testimony of Wallace B. Boggs.)

Mr. Smith: To which offer we object on the same grounds that we objected to the admission of Exhibit X-5 to Exhibit X-100, inclusive, namely, that the evidence offered is incompetent because it does not pursue the method which the contract prescribes exclusively in connection with the performance of the work of completing the construction of the project, and upon all the other grounds which we mentioned in objecting to the admission of the indicated number of exhibits.

Mr. Alexander: We join in the objection.

The Court: Overruled.

Mr. Smith: Exception.

Mr. Alexander: Exception. [2115]

(The group of documents was marked "Defendant's Exhibit X-116.")

[Set forth in the Book of Exhibits at page 630.]

Mr. Tinning: Q. Mr. Boggs, referring to your testimony of yesterday, to Defendant's Exhibit X-113, I ask you if, in your opinion, the sum of \$69,001.85, the total of the cost of maintenance and protection of the work mentioned, the work of measuring the work to complete the project, re-advertising and insurance, as set out on the table forming a part of the exhibit and attached to Exhibit X-113, is the reasonable value of the cost of the protection and maintenance and other items referred to in the question.

Mr. Smith: To which we will object on the grounds—all the other grounds we have heretofore

(Testimony of Wallace B. Boggs.)

urged in objecting to the proof of this particular group of items, and, in addition, that that subject matter is not properly the subject of expert testimony and, therefore, that the question is further objectionable as calling for the opinion and conclusion of the witness on a matter which is not susceptible of opinion and conclusion testimony.

Mr. Alexander: We join in the objection.

Mr. Wittschen: May I ask a question there? Do you object to the fact that we put in one sum total, because probably, if you do, we ought to take up the various figures and make up a table and ask upon each one of those if it is reasonable and so forth? But, if you don't make that objection—

Mr. Smith: No; I have not made that objection; I specifically did not.

The Court: The objection does not go to the form as it is presented?

Mr. Smith: No.

The Court: Objection overruled.

Mr. Smith: Exception.

Mr. Alexander: Exception.

The Witness: A. Yes. [2116]

Mr. Smith: Your Honor, may the record be clear that this particular character of testimony about this subject where you admitted all the basic testimony subject to a motion to strike, I take it your same ruling applies to this?

The Court: Yes; it comes in over your objection and motion to strike. If it develops in argument

(Testimony of Wallace B. Boggs.)

there is something here that I am not satisfied with, why, I will rule it out.

Mr. Tinning: Q. Mr. Boggs, in your opinion was the cost of completing the work under Schedules "A" to "H", inclusive, in the contracts referred to and listed in Defendant's X-109, the total sum being \$1,751,611.74, the reasonable cost of completing the project of the District under contracts on the cessation of work by Six Companies on the 13th of June, 1936?

Mr. Smith: To which question we will object on the ground the testimony is immaterial and for the reasons heretofore urged along that same line of testimony.

Mr. Alexander: We join in the objection.

The Court: The objection will be overruled.

Mr. Smith: Exception.

Mr. Alexander: Exception.

The Witness: A. Yes.

Mr. Tinning: Q. I show you Exhibit X-115, simply for the purpose of some figures that appear on here. Mr. Boggs, what is the number of days, from June 14, 1936, to November 19, 1936?

A. 149 days.

Q. What is the number of days from November 10, 1936 to July 31, 1937? A. 264 days.

Q. In your opinion, was the period of 149 days,—the period from and including June 14, 1936 to November 19, 1936,—the reasonable period of time

(Testimony of Wallace B. Boggs.)
for the District to measure the work, readvertise it and [2117] get it under contract again?

Mr. Smith: Just a moment. We will object to the question on the ground it calls for testimony which is inadmissible for the reasons heretofore urged as to this line of testimony.

Mr. Alexander: We join in the objection.

The Court: Overruled.

Mr. Smith: Exception.

Mr. Alexander: Exception.

The Witness: A. Yes.

Mr. Tinning: Q. Was the period of time from and including November 10, 1936 to July 31, 1937 a reasonable period of time for the completion of the work on the project of the District remaining to be done after cessation by Six Companies of California under contract?

Mr. Smith: Same objection.

Mr. Alexander: Same objection.

The Court: Same ruling.

Mr. Smith: Exception.

Mr. Alexander: Exception.

The Witness: A. Yes.

Mr. Tinning: Q. Now, Mr. Boggs, we will return to the matter that we last had under consideration in yesterday's session. In addition to the computation of the traffic count that you referred to yesterday in connection with this particular project, I will ask you if, in your work as an Assistant County Surveyor of Alameda County, you at vari-

(Testimony of Wallace B. Boggs.)

ous times and as part of those duties ever took traffic counts and used the same in engineering and economic problems in connection with road construction. A. Yes.

Q. What average cost per mile in making such computations do you attribute to each automobile or vehicle using the road? [2118]

Mr. Smith: Objected to on the same grounds that we objected to the evidence yesterday, and, in order to shorten it, I won't repeat it, concerning this type of testimony.

Mr. Alexander: We join in the objection.

The Court: Overruled.

Mr. Smith: Exception.

The Court: It will come in subject to a motion to strike and over the objection of counsel.

The Witness: A. Four cents per vehicle mile.

Mr. Tinning: Q. Using those figures, Mr. Boggs, where the annual traffic which you testified to yesterday that used the route in question,—1,911,870 vehicles annually gave an average vehicle use of the road 5,238 per day,—what is the economic value or figure of the use of that route per day?

Mr. Smith: We will object to that upon the same grounds as heretofore urged, and object on the further ground the question is compound and uncertain.

Mr. Alexander: Same objection.

Mr. Tinning: I think the last part of the objection is good.

The Court: That element of economics,—that field you are going into,—be careful about that.

(Testimony of Wallace B. Boggs.)

Mr. Tinning: We will withdraw the question, in view of its viciousness.

Q. Mr. Boggs, multiplying the average number of vehicles by the average cost per vehicle of the saving in distance of the route provided by the Broadway Low Level Tunnel route over the previously used routes, what is the saving per day by the use of the Broadway Low Level Tunnels on the traffic count figures which you have testified to?

Mr. Smith: Just a moment. We will object to that on the ground [2119] it absolutely calls for pure speculative answers and conclusions of the witness, and also it is based on a state of facts not in evidence and has nothing to do with the issues involved, in addition to the objections we made to this whole line of testimony.

Mr. Alexander: Same objection.

The Court: May the Court inquire, at this time: the purpose of this offer is what?

Mr. Tinning: The purpose of the offer is to show, your Honor, the difficulty of estimating the amount of actual damage that will accrue to the District and the public if there is delay on this work; and it is for that purpose that this line of testimony, as stated yesterday, is offered. As we understand the law of liquidated damages, the damages must be reasonable; and we have a right, where it is difficult,—extremely difficult,—to estimate the actual loss, to stipulate in a contract for liquidated damages and, in showing there was a reason for

(Testimony of Wallace B. Boggs.)
such stipulation, we think we have a right to go into these things.

The Court: This is off the record.

(Discussion, off record by direction of the Court.)

[2120]

The Court: Indicate for the record the purpose of the offer.

Mr. Wittschen: As I understand the California rule of damages, while liquidated damages can only be allowed when actual damages are difficult of exact ascertainment, they also must be reasonable. Counsel has made two objections. One is that liquidated damages should not be allowed at all, and I think perhaps they have in their minds that the actual damage could be proved. We offer this testimony not to get a judgment against them for the inconvenience that the public suffers in an exact amount, but to show that there is a real loss and inconvenience and that the damage is difficult or impossible of exact ascertainment. So much for this particular evidence that is in now, to show the difficulty as to liquidated damages. Then on the other item that the District suffers by each day that it must continue in operation beyond the day it would have continued had the contract been completed in time, and in order to show the monetary loss on the bonds, we offer that as proof of the actual loss for the same purpose as the other, to show that the amount of liquidated damages is reasonable, or to show somewhat the difficulty of exact ascertainment.

(Testimony of Wallace B. Boggs.)
but that damage as to those two last items, they are specific and they are accurate, so that your Honor will have that information before you.

Mr. Smith: We renew our objection.

Mr. Alexander: We make the same objection.

The Court: The objection is overruled.

Mr. Smith: Exception.

Mr. Alexander: Exception.

Mr. Tinning: Q. Mr. Boggs, will you answer?

A. \$419.04 a day.

Q. 149 days from and including June 14, 1930 to and including November 9, 1936, and the 264 days from and including November 10, 1936 [2121] to and including November 30, 1937, aggregate the sum of 413 days, do they not?

Mr. Smith: The same objection.

Mr. Alexander: The same objection.

The Court: Overruled.

Mr. Smith: Exception.

Mr. Alexander: Exception.

A. Yes.

Mr. Tinning: Q. Your last testimony, or all of the testimony with respect to the traffic is only for the specific purpose of supporting the theory that we have announced here that we are entitled to liquidated damages as we do not think liquidated damages and actual damages are the same item. Mr. Boggs, it is true, is it not, that on or about the 22nd day of May, 1934, after public tender of the bonds of the District by the Board of Directors, that the

(Testimony of Wallace B. Boggs.)

District issued and sold after proceedings duly and regularly had by the District its bonds in the sum of \$2,378,000?

Mr. Smith: Objected to on the same grounds that the evidence previously was objected to.

Mr. Alexander: The same objection.

The Court: The objection will be overruled.

Mr. Smith: Note an exception.

Mr. Alexander: Note an exception.

A. Yes.

Mr. Tinning: Q. And those bonds were 15-year bonds consisting of \$158,000 in the first fourteen series and \$167,000 in the last or fifteenth series?

Mr. Smith: The same objection.

Mr. Alexander: The same objection.

The Court: The same ruling.

Mr. Smith: Exception. [2122]

Mr. Alexander: Exception.

A. Yes.

Mr. Tinning: Those bonds are unconditionally payable by the District irrespective of whether or not the project of the District was completed?

Mr. Smith: The same objection.

Mr. Alexander: The same objection.

The Court: The same ruling.

Mr. Smith: Exception.

Mr. Alexander: Exception.

A. Yes.

Mr. Tinning: Q. And the District has regularly paid those bond maturities that became due in 1935, 1936, 1937 and 1938 on the 2nd day of January?

(Testimony of Wallace B. Boggs.)

Mr. Smith: The same objection.

Mr. Alexander: The same objection.

The Court: The same ruling.

Mr. Smith: Exception.

Mr. Alexander: Exception.

A. Yes.

Mr. Tinning: Q. And also the interest on all of the bonds that were issued on or after May 22nd as the same became due under the terms of the bond issue?

Mr. Smith: The same objection.

Mr. Alexander: The same objection.

The Court: The same ruling.

Mr. Smith: Exception.

Mr. Alexander: Exception.

A. Yes.

Mr. Tinning: Q. After allowing to the plaintiff Six Companies of California all of the credits to which it was entitled, Mr. Boggs, [2123] is the sum of \$108,066.31, set forth in the last figure on Defendant's Exhibit X-112 the reasonable increased cost of completing the District's project?

Mr. Smith: To which question we object on the same grounds as we objected to the admission of the said Exhibit X-112.

Mr. Alexander: We join in the objection.

The Court: The objection is overruled.

Mr. Smith: Note an exception.

Mr. Alexander: Note an exception.

A. Yes.

Mr. Tinning: You may cross-examine.

(Testimony of Wallace B. Boggs.)

Cross Examination

Mr. Smith: Q. Taking Exhibit 114, Mr. Boggs, what is the nature of the items Expenses opposite about 1111 under the four items on the third page of the exhibit?

A. Those are traveling expenses authorized by the District to be paid.

Q. Traveling expenses of yourself.

A. Of myself.

Q. What would be the nature of the traveling expenses?

A. That would be mileage from my office to the various parts of the job.

Q. The west end of the job is located in Oakland, where you had your office? A. Yes.

Q. The east end of the job was three or four thousand feet? A. In Contra Costa County.

Q. Just through the tunnel in the other end?

A. Yes.

Q. Then, as I understand it, your answer is that the expense included your running back and forth from your office and house to the work in an automobile?

A. No, not to my house; only from the office, downtown office, to the job.

Q. What is the nature of the item with regard to the three names next appearing, Barkley, Collins and Hunter?

A. Those are the same [2124] type of expenses, traveling expenses between the office and up and down the work on the job.

(Testimony of Wallace B. Boggs.)

Q. What is the nature of the comptroller's bond? Is that an official bond exacted by the Board of Directors from their Comptroller and the payment of the premium on the bond? A. Yes.

Q. What is the expense item E. H. Frisell?

A. Mr. E. H. Frisell was an inspector on the work and he was entitled to traveling expenses.

Q. What is this Alhambra Water Company? Did they serve water to the office? A. Yes.

Q. What did you buy water from the Alhambra Water Company for?

A. For drinking purposes.

Q. What is the nature of the expense items of Campbell, Driggs, Hammer, Hunt, Ray, Riggs, Loomer and Morin?

A. Those also are traveling expenses on the job.

Q. And what is the nature of the item in June of Braun-Knecht-Heiman Co., Chapman Flask? What does that mean?

A. That is for the purchase of a piece of equipment which was used in the testing of some of the material which went into construction work.

Q. Now, does the statement in the column which is the third column from the left-hand side of the page of the exhibit which you have before you, namely, page 3, does that purport to state the general nature of the expenditures involved in the items in question? Does that purport to be descriptive in a general way of the nature of the expenditures?

A. Yes.

(Testimony of Wallace B. Boggs.)

Q. And the name in the second column, there, is the name of the party to whom the expenditure was made: is that right?

A. Yes, in accordance with the voucher.

Q. Wherever in the same exhibit expenses that you have described in connection with any of the individuals whose names I have read, [2125] and about which I have asked you, is the expense of the same kind that you just testified? A. Yes.

Mr. Smith: That is all.

Mr. Alexander: I have some questions.

Q. What changes were made from the original specifications in Schedules A to H?

A. There were no changes made, Mr. Alexander, in the construction of the work. The only change which was involved was the breaking down of the work into 8 schedules and providing for the payment thereof to conform to those schedules.

Q. So, as I understand it, the schedules mean eight different contracts? A. Yes.

Q. And in each case the payment was made to a contractor based on a contract? A. Yes.

Q. The contract included the contract price, profit and whatever else was in it?

A. The contract price.

Q. Now, taking the project, itself, that was finished about what time?

A. December 1, 1917.

Q. That is, the entire project was completed at that time? A. Yes.

(Testimony of Wallace B. Boggs.)

Q. In December of 1936, when the cross-complaint was filed, the project had not been completed, had it? A. No.

Q. How far from completion was it in December, 1936?

A. Mr. Alexander, I do not know just how to answer that. There was work done on all parts of the project and there was practically nothing of the project that was fully completed.

Q. That is a good enough answer. By December, 1936 how much work had been done between June 13, 1936 and December, 1936, when the cross-complaint was filed?

A. There had been no work done by the contractor, by any contractor during that period.

Mr. Tinning: What date in December?

Mr. Alexander: I will get to the exact date when the cross-complaint was filed. The cross-complaint was filed December 16, 1936. [2126] On that date what part, if any, of the eight schedules had you completed?

A. None of those schedules had been completed.

Q. Had any of them been begun?

A. Yes, work on Schedule A had been begun.

Q. How much work was done on Schedule A?

A. The contractor had been working for seven or eight days at that time.

Q. Now, after the contract was completed and all the schedules were completed and the project completed did you make a final estimate of the cost?

(Testimony of Wallace B. Boggs.)

A. Yes.

Q. That was made sometime after November 30, 1937, was it not? A. Yes.

Q. Not before that time? A. No.

Q. Did the District ever give any notice to the cross-defendant sureties companies of that final estimate? A. Not to my knowledge.

Q. Now, taking June 13, 1936, you have that date in mind? A. Yes, very well.

Q. At that time how much of the retained percentage did the District have?

A. 10 per cent, according to the contract.

Q. And how much of the Six Companies' money did the District then have? Can you give us the approximate figure?

Mr. Tinning: I think we had better have the exact figure.

Mr. Wittschen: We put them in.

Mr. Alexander: You have the figures, let us get them.

The Court: We will take a recess for a few minutes. [2127]

(After Recess)

Mr. Tinning: Q. Have you got the figures you need, Mr. Boggs? A. Yes.

Cross Examination.

Mr. Alexander: Q. Mr. Boggs, on June 13, 1936, how much did the District hold of retained percentages?

Mr. Tinning: Q. On June 13th, Mr. Boggs.

(Testimony of Wallace B. Boggs.)

The Witness: A. Yes. \$251,149.97.

Mr. Alexander: Q. That is explained by the fact that, as Six Companies earned, 10 per cent was withheld? A. Yes, sir.

Q. And that withheld money has never been paid to Six Companies? A. No.

Q. Now, as of the same date, according to your figures, how much had Six Companies earned in May of 1936?

A. I am sorry; I have not that figure in front of me, Mr. Alexander.

Mr. Tinning: I will give it to him.

Mr. Alexander: May I look at that figure? Maybe we can get it the same way. I will reframe the last question.

Q. Now, in addition to the figure of \$251,149.97 retained percentages, what other monies have been withheld by the District belonging to Six Companies?

A. The amount of Estimate No. 24, the estimate dated June 10th, of \$148,586.98, and the estimate for work from June 1st to June 13th amounting to \$80,715.66. These last two items were—the checks were tendered—

Q. Pardon me. Just answer the question.

Mr. Tinning: I think he has a right to explain it.

Mr. Alexander: Q. All right, go ahead.

A. The last two checks were tendered to Six Companies and returned by them.

(Testimony of Wallace B. Boggs.)

Q. Then there is a total aggregate of monies of Six Companies retained by the District amounting to how much?

Mr. Tinning: There was. [2128]

The Witness: A. \$480,452.61.

Mr. Alexander: Q. And that has never been paid, except as you stated? A. That is correct.

Mr. Alexander: That is all.

Redirect Examination

Mr. Tinning: Q. Mr. Boggs, when you say, as you stated to Mr. Alexander, it was paid to the other contractors who finished the work and was deducted from the amount of the increased cost and made a figure of \$108,066.31? A. Yes.

Mr. Alexander: To which we will object on all the grounds asserted and made to this line of questioning.

The Court: Overruled.

Mr. Alexander: Exception.

Mr. Smith: We join in the exception.

The Witness: A. Yes.

Mr. Tinning: Any further questions, gentlemen?

Mr. Smith: No questions.

JOSEPH BARLOW LIPPINCOTT,

called by the defendant and cross-complainant;
sworn.

Direct Examination

Mr. Tinning: Q. Mr. Lippincott, you reside in Los Angeles? A. I do.

Q. You graduated from the University of Kansas in 1887 as a Bachelor of Science, and you are a member of the American Society of Civil Engineers? A. Yes.

Q. And for all the years since 1887 you have engaged in engineering work? A. I have.

Q. Both as an active construction manager and as a consultant? A. Yes, sir.

Q. You were employed for many years by the United States, in its [2129] Reclamation Service, were you not? A. Yes.

Q. You made the first survey of locations of the Hetch Hetchy project for San Francisco?

A. I did that, but not for the Reclamation District. That was private work.

Q. Private work? A. Yes.

Q. You have been employed in the capacity of a consultant on many tunnel projects in the past years, have you not?

A. Yes, I have been actively in charge of the work and also as a consultant engaged in such work.

Q. At the present time, you are a consultant for the City of Los Angeles on its Mono Water Development project, are you not? A. Yes, sir.

(Testimony of Joseph Barlow Lippincott.)

Q. You have been a consultant for the City of Los Angeles in its water development work over a great many years, have you not?

A. Yes, over 35 years.

Q. In the Mono project which is now under construction, as I understand it, there are many tunnels, or many miles of tunnels?

A. No; not on the Mono project proper. There is one very large tunnel, and one small—two small tunnels.

Q. Which is now under construction?

A. Yes.

Q. You were employed by this District,—Joint Highway District No. 13,—in August, 1935, were you not?

A. Yes, sir.

Q. And you have made frequent visits to the project of the District since that time?

A. About twenty.

Q. You were familiar with the problems to be met by the District on and following June 13, 1936, at the time Six Companies of California ceased work on the project?

A. Yes.

Q. From your experience as an engineer, will you state whether or not, in your opinion, the increased cost after allowing Six Companies the credits for the retained percentages, and other credits, the [2130] sum of \$108,066.31 is a reasonable sum?

Mr. Smith: Just a minute. We will object to this question upon all the grounds heretofore urged in objecting to this line of testimony before.

(Testimony of Joseph Barlow Lippincott.)

Mr. Alexander: Same objection.

The Court: Overruled.

Mr. Smith: Exception.

Mr. Alexander: Exception.

The Witness: A. The additions and subtractions to arrive at that \$108,000 I am not fully familiar with. I am familiar with a figure of 1,751,000 and some odd dollars which was the cost of completion. The figure that I last referred to was \$1,751,611.74.

Mr. Tinning: Q. That is the cost of the work under the contracts for Schedules A, B, C, D, E, F, G and H? A. Yes.

Mr. Smith: Same objection.

Mr. Alexander: Same objection.

The Court: Same ruling.

Mr. Smith: Exception.

Mr. Alexander: Exception.

Mr. Smith: I ask that the objection and the exception be noted prior to the answer.

Mr. Alexander: May that be done, your Honor?

The Court: It may be done.

Mr. Tinning: Cross-examine, gentlemen.

Mr. Smith: No questions.

Mr. Wittschen: Just a moment, please.

Mr. Tinning: Q. Mr. Wittschen suggests that I did not make my question broad enough. In your opinion, Mr. Lippincott, is the sum of \$1,751,611.74 paid to the Contractors by the District under Sched-

(Testimony of Joseph Barlow Lippincott.)

ules A to H, all letters inclusive, the reasonable value of the [2131] cost of completion of the work remaining to be done after Six Companies left the work on the 13th of June, 1936?

Mr. Smith: To which we want to interpose the same objection as heretofore made.

Mr. Alexander: I join in the objection.

The Court: Overruled.

Mr. Smith: Exception.

Mr. Alexander: Exception.

The Witness: A. In my opinion, it is a reasonable figure.

Mr. Tinning: Cross-examine.

Mr. Smith: No questions.

Mr. Alexander: No questions.

H. A. VAN NORMAN,

called by defendant and cross-complainant; sworn.

Direct Examination

Mr. Tinning: Q. Mr. Van Norman, you reside in Los Angeles? A. Yes.

Q. What is your occupation?

A. I am at present the Chief Engineer and General Manager of the Bureau of Public Works and Supplies for the City of Los Angeles.

Q. How long have you been connected with the Bureau of Public Works with the City of Los Angeles? A. Since 1907.

(Testimony of H. A. Van Norman.)

Q. During that time, have you been actively participating in the development of the water system of the City of Los Angeles as an engineer?

A. Yes. I might qualify my first answer to the extent that for a period of about 2½ years, from 1923 to 1936, I was City Engineer of the City of Los Angeles on leave of absence from the Water Department.

Q. During the period of your work, have you had to do with the estimating of the cost of the work done by your Department?

A. Yes. [2132]

Q. During that period, have you had experience with the construction of tunnels?

A. Yes.

Q. You were employed by Joint Highway District No. 13 of the State of California in August of 1935, prior to the time that the slide occurred?

A. Yes, just prior.

Q. Since that time, Mr. Van Norman, have you frequently visited the work of the tunnels on the Broadway Low Level Tunnel project?

A. Yes; I made occasional, frequent trips.

Q. Were you familiar with the problems that confronted the District on or about June 13, 1936, with respect to proceeding with the construction of this work after Six Companies ceased work on that date?

A. Yes, sir.

Q. Are you familiar with the work that was done by the contractors who completed the project

of the District under Schedules A, B, C, D, E, F, G and H? A. Yes.

Q. In your opinion, was the sum of \$1,751,-611.74, paid by the District for the completion to the contractors, for the completion of that work, a reasonable sum?

Mr. Smith: Just a moment. We object to that question on all the grounds heretofore urged to the same type of testimony.

Mr. Alexander: We join in the objection.

The Court: Objection overruled.

Mr. Smith: Exception.

Mr. Alexander: Exception.

The Witness: A. Yes, I consider that figure a reasonable one for the cost of the completing of the work.

Mr. Tinning: Q. Do you consider the sum of \$108,066.31, the increased cost of the work to the District, the reasonable figure?

Mr. Smith: Same objection.

Mr. Alexander: Same objection.

The Court: Overruled: [2133]

Mr. Smith: Exception.

Mr. Alexander: Exception.

The Witness: A. If that sum is confined to the construction work only, my answer is "Yes."

Mr. Tinning: Q. Well, I will show you Defendant's Exhibit X-112,—which is a tabulation of the amount that was earned by Six Companies, the amount that was paid to the contractors who finished, and less the credits to Six Companies for the

(Testimony of H. A. Van Norman.)

retained amounts by the District, and a credit for incompleated work appearing on no estimate.

A. With that explanation, my answer is "Yes."

Mr. Tinning: You may cross-examine, gentlemen.

Mr. Smith: No questions.

Mr. Alexander: No questions.

Mr. Wittschen: That is our case.

Mr. Tinning: Any rebuttal?

Mr. Smith: No.

Mr. Wittschen: At this time, if the Court please, the evidence on all issues being closed, the defendant and cross-complainant moves, again, as it did before, and incorporates in this motion, a motion for judgment and special findings as that motion was heretofore made at a session of this Court on Friday, May 27, 1938; and, in addition thereto, the cross-complainant now moves the Court for a judgment in its favor against the plaintiff and cross-defendants, and against each of the other surety cross-defendants that are still in the case, moving for a judgment against the plaintiff for the full amount of its cross-complaint and for a judgment against each of the sureties respectively for that amount [2134] for which they are liable under the

bond which is in evidence in this case; and the defendant and cross-complainant moves separately for a judgment in its favor on each and every and all of the issues raised by the cross-complaint, and the answer of the plaintiff and cross-defendant, and also the answers or answer of the respective surety companies, and on each and every one of the separate defenses that are raised in the respective answers.

This motion is made upon the ground that, the Court having decided the plaintiff had no right to rescind the contract but in effect abandoned it, a cause of action for the damages the defendant and cross-complainant sustained springs from that breach, and on the further ground that the defendant and cross-complainant is entitled to damages for the increased cost of completing the work as one item for the cost of protecting and maintaining the work, as those items have been specially pleaded and proven, and also for liquidated damages at the penalty prescribed in the amount of \$500 per day. We are not asking for special damages for delay, but rely upon the penalty for liquidated damages.

Findings embodying each of these questions will be prepared and filed, and we ask for special findings and special conclusions of law in our favor on each and every and all of the issues, and ask that judgment be rendered in the amount prayed for in the prayer of the cross-complaint as amended against the plaintiff for the full amount and against

each of the sureties for their proportionate amount respectively.

The Court: May I inquire: What does the record disclose in relation to the sureties?

Mr. Wittschen: The sureties, in their answer, admit the execution of the contract, and, of course, as part of our original complaint, a letter was written to each of the sureties—— [2135]

The Court: That is in the record already?

Mr. Wittschen: Yes; and the surety companies stipulate they did not complete the contract, and they were notified.

Mr. Smith: We will have opposition to the motion, of course; but, before discussing that motion and making a further motion, we desire to make a motion to strike; and, to enable me to make a more accurate statement of the motion, I have written it out but will not file it, but will read it into the record.

Plaintiff and cross-defendant moves to strike from the record in the case the evidence given and offered through the witness Wallace B. Boggs concerning

(a) Cost of employing engineers, office force, watchmen, and procuring materials and supplies for operation of the District after June 13, 1936;

(b) Cost or expense to the District for interest on its outstanding bond issue during any period after June 13, 1936;

(c) Amount of traffic over the so-called Tunnel Road, or evidence concerning alleged damage to public from non-completion of the project of the District on or before May 24, 1936.

The evidence so objected to commences at approximately line 7 on page 1671 of the transcript, beginning with the question: "During the period following the 24th day of May, 1936, did the District continue to employ engineers, etc.?" and continues down to and including the question: "Under the direction and control of what department—was it the Department of Public Works of the State of California?" on page 1682 of the transcript; and this motion is directed to all thereof beginning at the page and place noted and ending at the page and place noted.

Also, to supplement what I have written out, the motion is likewise directed to the testimony adduced here this morning along [2136] the same lines, concerning the same subjects which I have mentioned, and, of course, I am not able to give a page number of the record because we have not yet been furnished with the typewritten record; but this motion is directed to the evidence which I specifically pointed out, as well as to what has been received this morning through the witness Boggs on the same subjects.

The evidence objected to and admitted subject to motion of plaintiff and cross-defendant to strike same is now moved to be stricken out upon the grounds that same is not proof in any manner of damage caused to cross-complainant by cross-defendant; also that the elements of damage sought to be established thereby are too remote and too speculative and not within the purview or rules of damages covering this subject; further that,

had it not been for the breach of the contract by the cross-complainant in improperly deducting penalties against the cross-defendant, all of the work would have been completed not later than January 3, 1937, which would have been the latest possible date when it would have been necessary for any of the elements covered by this evidence to have continued; further, that no matter whether cross-complainant was engaged in constructing its project or not it was liable for payments of its bond interest; that no revenue was derived by cross-complainant from the tunnels or project, and therefore no damage could have possibly been sustained by any delay in completion of same by Joint Highway District or by the public; that the evidence concerning the use of the highways by the public is purely speculative and guess work, and has nothing to do with any issues involved in this case; further, for the reasons stated by me, the evidence is incompetent, irrelevant and immaterial, and should be stricken from this case. [2137]

Mr. Alexander: The cross-defendant surety companies join in the motion to strike out on the same grounds.

Mr. Wittschen: Your Honor, so that the record may be clear, that portion of plaintiff's motion which is directed to the cost of protecting the work and taking care of the project until new bids were called is an element of damage that springs from the breach. The cost of the bond issue, the interest on the bonds, the cost as shown to the traveling

public, and those matters that counsel claims are speculative were not offered and we are not asking for those as specific items of damage. They were merely offered to show two things, one that the liquidated damages were not unreasonable, and also to show the difficulty of the proof of actual damages. The law in California is that where actual damages cannot be proven, or that their proof will be extremely difficult, the parties may agree upon reasonable stipulated liquidated damages, and as I said before and now repeat we are not asking for double damages, we are not asking for damages in excess of the penalty of \$500 a day, but we are asking for damages for that penalty because we think it is reasonable, and because it comes within the rule. And we rely upon the cases that are all in that last brief that I handed to your Honor, which I called "Defendant's First Supplemental Brief"—there are two or three cases in there that are squarely on the point; the latest, perhaps one of the best considered cases, is that City of Reading Case; and I have also put in numerous cases from California which hold that a penalty of this kind is proper or liquidated damages in lieu of the penalty.

Mr. Smith: We have other motions to make, and we think it would be better to get them all in.

Mr. Wittschen: Do you want a ruling on one at a time?

The Court: Do you desire the Court to rule now?

[2138]

Mr. Smith: It is entirely up to your Honor.

The Court: I want to analyze some of the phases in respect to damages, for instance, actual damages. If I follow counsel, the damages do not exceed the \$500 a day?

Mr. Wittschen: Yes, if you will take the interest—

The Court: I am interested in the actual work.

Mr. Wittschen: The actual damages in a case of this kind, if your Honor please, cannot be proven. It is obviously true, as Mr. Smith has stated, that the Highway District, as a District—as Mr. Tinning has corrected me, the actual damages, of course, for increased cost can be proved and the actual damage for protecting the work can be proved, and as to those two items, one of which is \$108,000 and the other \$69,000, those are actual damages, and are proven, and they spring from the breach. The actual damages for delay cannot be proven. Take, for instance, the construction of a city hall, take a school building, it is impossible to show just what the inconvenience and damage would be to the public that want to use a new school building or to the public that wanted to use a city hall. We have merely shown, your Honor, we had several millions of dollars invested in this project, and that the cost on that alone amounted to more than \$200 a day. We have also shown, your Honor, that the cost of keeping the District intact amounted to \$278 a day. It is perfectly obvious that you cannot get that cost down to exact refinement. The District will have to keep some nominal assistance as long

as the bond issue holds; in fact, there would be no cost if the county would take that over, it is hard to say, the District may have to keep this force going for some days, even after this contract has been completed, to do certain check-up work. That \$278 was not offered as an exact item of damage, and we are not asking your Honor to consider it an such, but the people who really lose the benefit of this tunnel [2139] are not alone the people residing in the District who use it, but they are the entire traveling public up and down the State.

The Court: It is my thought on that that we are getting into the realm of speculation.

Mr. Wittschen: That is why you have liquidated damage, because you cannot prove the actual damage; if the actual damages could be proven we would have to prove them, we could not have liquidated damages, and the Code provision provides, I think it is Section 1671 of the Civil Code—I will get it if your Honor wants it accurately.

The Court: I suggest that you submit your motion now, that is, if it does not interfere with what you have in mind.

Mr. Smith: What we had in mind was that the Court stated at the time we made the motion that you would like to pass upon it after argument, at the conclusion of the case. That is what your Honor has indicated, as I understood your Honor. I do not want to get into an elaborate argument, but we do not agree in any manner with counsel's statement that the law is as he says.

The Court: I might say that this case will go forward after I am through with it, and I want to do everything possible for me to do.

Mr. Smith: Your Honor is obligated to decide it in accordance with your conscience and the rules of law, but we have other motions to make, and we think we could make those and then argue the matter after lunch.

The Court: I think that would probably be the better thing to do.

Mr. Smith: Or argue it at a later date, or tomorrow morning. As I understand, it is stipulated now that all of the evidence is closed in the case.

Mr. Wittschen: That is correct.

The Court: On both sides? [2140]

Mr. Smith: Yes.

The Court: Very well, you can make your other motions and I will reserve my ruling on that.

Mr. Marrin: I have two motions to make. There is a counter claim in the answer as well as the cross complaint, and I think we should make the motions in both of those.

Motion of Plaintiff for Special Findings of Fact and Conclusions of Law and for Judgment in its favor on the counterclaims of defendant.

Plaintiff now moves the Court for a judgment in its favor on the counterclaims of defendant and on each of them, which counterclaims are set forth in the answer of defendant as a part of the fourth defense to the first count of the complaint on file herein and as a part of the fourth defense to the

second count of said complaint. Said motion is made on all of the following grounds:

I.

That the undisputed evidence in this case establishes substantial breaches of both express and implied conditions of the contract by the defendant, causing great loss and damage to the plaintiff in that defendant failed to make payment to plaintiff on June 10, 1936, at which time plaintiff was not in default in any manner in the performance of the contract, of the money due plaintiff from defendant under the contract for work done by plaintiff during the month of May, 1936, and by deducting from the money due plaintiff the sum of \$500 per day for each day after May 24, 1936, and thereby declaring its intention to continue to breach said contract by failing to pay plaintiff the amount due it under said contract if plaintiff continued to perform same by further deduction of the sum of \$500 per day until the work under said contract was completed on about the 3rd day of January, 1937, or a total deduction of [2141] \$112,000.00, from money justly due plaintiff under the terms of the contract, to plaintiff's great injury and damage, thereby justifying its rescission of the contract.

II.

That the undisputed evidence establishes that the defendant failed and refused to give to plaintiff any extension of time within which to complete the per-

formance of the work under the contract, and that such refusal was wrongful and illegal because plaintiff had been unavoidably delayed in the performance of the work under the contract for a period of 300 days, or more, and had also been delayed in the performance of the work under said contract by reason of stormy or inclement weather, and had been delayed by operation of law, and plaintiff was thereby justified in rescinding the contract.

III.

That the undisputed evidence in this case establishes a substantial breach by the defendant of the contract in that the materials through and under which the tunnels were to be constructed were substantially different from those shown, or predicted, or represented in the geological report furnished to bidders, in the plans and specifications furnished to bidders, and in the contract and the specifications forming a part thereof entered into; and made the performance of the work much more difficult and expensive than it would have been had the materials corresponded with the materials predicted and represented by and in the geological report and the contract, plans and specifications; and thereby the warranty contained in the contract and relied upon by plaintiff in making same, as to the materials to be found through which the tunnels would be built, was breached to plaintiff's great injury and damage.

IV.

That the undisputed evidence in this case establishes construct- [2142] ive fraud on the part of the

defendant in inducing plaintiff to enter into the contract.

V.

That the undisputed evidence in this case establishes capricious and arbitrary conduct by the District Engineer of the defendant in failing and refusing to determine and adjudge that plaintiff was unavoidably delayed in the doing and performance of the work.

VI.

That the undisputed evidence in this case establishes that a gross mistake was made by the Engineer of the defendant District in failing and refusing to determine and adjudge that plaintiff was unavoidably delayed in the doing and performance of the work.

VII.

That the undisputed evidence in this case establishes that the defendant breached the contract by failing and refusing to give plaintiff proper lines and grades to work to in the construction of the tunnels.

VIII.

That the undisputed evidence in this case establishes that a mutual mistake was made by the plaintiff and defendant in entering into the contract in that plaintiff and defendant both believed that the ground through which the tunnels would be driven would be of self-supporting character for about 2,000 feet of the length of each of the tunnels; and both parties relied upon this fact in entering into

said contract; and in truth and in fact the ground through which said tunnels were driven was entirely nonself-supporting, but required artificial support throughout before and during the lining of the tunnels with concrete to the extent that it was impossible to remove such artificial support, thereby causing plaintiff great injury and damage. [2143]

That the undisputed evidence in this case establishes that plaintiff relied upon the information contained in the various documents furnished to it by defendant prior to bidding, including particularly the geological report, plans, and specifications, and planned the doing of the work covered by the contract in reliance upon the information so furnished that the ground through which the tunnels would be driven would be found to be self-supporting for the most part; and by reason of the fact that none of said ground was self-supporting, plaintiff was unable to construct the tunnels in accordance with its plans made in reliance upon the information furnished by the defendant, thereby causing great injury and damage to plaintiff.

X.

That the undisputed evidence shows that plaintiff did not abandon the contract but rescinded the same for material breaches thereof by defendant entitling plaintiff to rescind.

XI.

That the undisputed evidence shows that under the contract and particularly paragraph 5 thereof, defendant was required, in the case of abandonment of the contract by plaintiff, to complete the work itself and that the defendant did not do so, but caused the work to be completed by contracts which defendant entered into with other parties.

XII.

That the undisputed evidence shows that defendant is not entitled to recover any damages on account of any delay in the completion of the work.

XIII.

That the undisputed evidence shows that the alleged expense [2144] to the defendant was not determined in the manner provided in the contract and specifications and the plaintiff was never notified by the defendant of the excess, if any, so claimed to be due.

XIV.

That there is no evidence which would justify an award of damages in favor of defendant and against plaintiff.

Plaintiff moves for such judgment for each of the reasons hereinbefore stated and further moves the Court for special findings of fact in accordance with the allegations of plaintiff's complaint and each count thereof.

Plaintiff further moves the Court for conclusions of law that defendant take nothing by said counterclaim set forth as a part of the fourth defense to the first count of the complaint on file herein and that defendant take nothing by said counterclaim set forth as a part of the fourth defense to the second count of said complaint, and plaintiff further moves for judgment in favor of plaintiff separately on each of said counterclaims.

Plaintiff requests special findings on each and all of the issues raised by said counterclaims and each thereof which findings will hereafter be prepared and presented prior to the conclusion of the trial and will embody findings upon each and all of the issues raised by the pleadings.

Mr. Wittschen: Mr. Marrin, have you finished with that?

Mr. Marrin: I have finished.

Mr. Wittschen: Might I ask you a question? My theory of that is that the counterclaim is no longer in the case. In other words, a counterclaim is an offset against something which might be recovered by the plaintiff. I would agree with you that could be addressed to the cross-complaint, but don't you think the counterclaim falls unless the plaintiff recovers something against which a [2145] counterclaim could be off-set.

Mr. Marrin: Under the Code section in this State I think the Court has the power to give relief on the counterclaim. About the only difference between a counterclaim and a cross complaint is

you must answer a cross complaint and you do not have to answer a counterclaim.

Mr. Wittschen: May it be stipulated that the motion that we made with respect to the cross complaint may apply to the counterclaim, if you so construe the provision?

Mr. Marrin: You mean the motion you just made?

Mr. Wittschen: The motion I just made on the issues raised on the cross complaint and answers thereto, that it may also be understood to be made to the counterclaim, that we make the same motion with respect to judgment in our favor on the counterclaim?

Mr. Marrin: There is no objection to that. I am simply making these motions because I want to be certain to protect our rights.

Mr. Wittschen: We had not filed our motion, and I think you have filed yours. You make no point that ours was not filed, and the motion may be deemed in proper form without the necessity of that?

Mr. Marrin: My understanding is it is not required that you do file it.

Mr. Alexander: I want to join in that because I have not prepared a motion, and I will have to state mine orally.

Mr. Marrin: It is done for the purpose of accuracy.

The Court: I think the only purpose is, out of an abundance of caution so that you may have a complete record.

Mr. Marrin: I assume your Honor would prefer that I present these motions before you pass on them.

Mr. Wittschen: Your other motion is substantially similar, [2146] I have read it. It might save time if it was deemed read and copied into the record.

Mr. Marrin: It is stipulated it may be deemed read and copied into the record.

The Court: Is it identical?

Mr. Smith: It is identical except for certain changes.

Mr. Marrin: I believe there are one or two grounds at the end that are slightly different.

The Court: It may be deemed read and copied by the Reporter.

(Motion of Plaintiff and Cross Defendant, Six Companies of California, For Special Findings of Fact and Conclusions of Law and for Judgment in its Favor on the Cross-Complaint of Defendant and Cross Complainant.

Plaintiff and cross defendant, Six Companies of California, now moves the Court for a judgment in its favor on the cross complaint of defendant and cross complainant on all of the following grounds:

I.

That the undisputed evidence in this case establishes substantial breaches of both express and implied conditions of the contract by the defendant and cross complainant, causing great loss and dam-

age to the plaintiff and cross defendant in that defendant and cross complainant failed to make payment to plaintiff and cross defendant on June 10, 1936, at which time plaintiff and cross defendant was not in default in any manner in the performance of the contract, of the money due plaintiff and cross defendant from defendant and cross complainant under the contract for work done by plaintiff and cross defendant during the month of May, 1936, and by deducting from the money due plaintiff and cross defendant the sum of \$500 per day for each day after May 24, 1936, and thereby declaring its intention to continue to breach said contract by failing to pay plaintiff and cross defendant the amount due it under said contract if plaintiff and cross defendant continued to perform same by further deduction of the sum of \$500 per day until the work under said contract was completed on about the 3rd day of January, 1937, or a total deduction of \$112,000.00, from money justly due plaintiff and cross defendant under the terms of the contract, to plaintiff and cross defendant's great injury and damage, thereby justifying its rescission of the contract.

II.

That the undisputed evidence establishes that the defendant and cross complainant failed and refused to give to plaintiff and cross defendant any extension of time within which to complete the performance of the work under the contract, and that such

refusal was wrongful and illegal because plaintiff and cross defendant had been unavoidably delayed in the performance of the work under the contract for a period of 300 days, or more, and had also been delayed in the performance of the work under said contract by reason of stormy or inclement weather, and had been delayed by operation of law, and plaintiff and cross defendant was thereby justified in rescinding the contract.

III.

That the undisputed evidence in this case establishes a substantial breach by the defendant and cross complainant of the contract in that the materials through and under which the tunnels were to be constructed were substantially different from those shown, or predicted, or represented in the geological report furnished to bidders, in the plans and specifications furnished to bidders, and in the contract and the specifications forming a part thereof entered into; and made the performance of the work much more diffi- [2148] cult and expensive than it would have been had the materials corresponded with the materials predicted and represented by and in the geological report and the contract, plans and specifications; and thereby the warranty contained in the contract and relied upon by plaintiff and cross defendant in making same, as to the materials to be found through which the tunnels would be built, was breached to plaintiff and cross defendant's great injury and damage.

IV.

That the undisputed evidence in this case establishes constructive fraud on the part of the defendant and cross complainant in inducing plaintiff and cross defendant to enter into the contract.

V.

That the undisputed evidence in this case establishes capricious and arbitrary conduct by the District Engineer of the defendant and cross complainant in failing and refusing to determine and adjudge that plaintiff and cross defendant was unavoidably delayed in the doing and performance of the work.

VI.

That the undisputed evidence in this case establishes that a gross mistake was made by the Engineer of the defendant and cross complainant District in failing and refusing to determine and adjudge that plaintiff and cross defendant was unavoidably delayed in the doing and performance of the work.

VII.

That the undisputed evidence in this case establishes that the defendant and cross complainant breached the contract by failing and refusing to give plaintiff and cross defendant proper lines and grades to work to in the construction of the tunnels.

VIII.

That the undisputed evidence in this case establishes that a [2149] mutual mistake was made by the

plaintiff and cross defendant and defendant and cross complainant in entering into the contract in that plaintiff and cross defendant and defendant and cross complainant both believed that the ground through which the tunnels would be driven would be of self-supporting character for about 2,000 feet of the length of each of the tunnels; and both parties relied upon this fact in entering into said contract; and in truth and in fact the ground through which said tunnels were driven was entirely nonself-supporting, but required artificial support throughout before and during the lining of the tunnels with concrete to the extent that it was impossible to remove such artificial support, thereby causing plaintiff and cross defendant great injury and damage.

IX.

That the undisputed evidence in this case establishes that plaintiff and cross defendant relied upon the information contained in the various documents furnished to it by defendant and cross complainant prior to bidding, including particularly the geological report, plans, and specifications, and planned the doing of the work covered by the contract in reliance upon the information so furnished that the ground through which the tunnels would be driven would be found to be self-supporting for the most part; and by reason of the fact that none of said ground was self-supporting, plaintiff and cross defendant was unable to construct the tunnels in accordance with its plans made in reliance upon

the information furnished by the defendant and cross complainant, thereby causing great injury and damage to plaintiff and cross defendant.

X.

That the undisputed evidence shows that plaintiff and cross defendant did not abandon the contract but rescinded the same for material breaches thereof by defendant and cross complainant entitling plaintiff and cross defendant to rescind.

[2150]

XI.

The undisputed evidence shows that under the contract and particularly paragraph 5 thereof, defendant and cross complainant was required, in case of abandonment of the contract by plaintiff and cross defendant, to complete the work itself and that defendant and cross complainant did not do so, but caused the work to be completed by contracts which defendant and cross complainant entered into with other parties.

XII.

That the undisputed evidence shows that defendant and cross complainant is not entitled to recover any damages on account of any delay in the completion of the work.

XIII.

That the undisputed evidence shows that the cross complaint was prematurely filed and does not state a cause of action against plaintiff and cross defendant.

XIV.

That the undisputed evidence shows that the alleged expense to the defendant and cross complainant was not determined in the manner provided in the contract and specifications and the plaintiff and cross defendant was never notified by the defendant and cross complainant of the excess, if any, so claimed to be due.

XV.

That there is no evidence which would justify an award of damages in favor of defendant and cross complainant and against plaintiff and cross defendant.

XVI.

That the undisputed evidence shows that the defendant and cross complainant is not a citizen of a different State from all of the cross defendants and for this reason this Court has no jurisdiction of the cross complaint. [2151]

Plaintiff and cross defendant moves for such judgment on all of the grounds hereinbefore stated and further moves the Court for special findings of fact in accordance with the allegations of the answer of plaintiff and cross defendant to the cross complaint.

Plaintiff and cross defendant further moves the Court for conclusions of law that plaintiff and cross defendant is entitled to judgment in said cross complaint and that defendant and cross complainant take nothing by its said cross complaint.

Plaintiff and cross defendant requests special findings on each and all of the issues raised by said cross complaint and the answer of plaintiff and cross defendant thereto, which findings will hereafter be prepared and presented prior to the conclusion of the trial and will embody findings on each and all of the issues raised by the cross complaint and the answer of plaintiff and cross defendant thereto.)

Mr. Alexander: The cross defendant surety companies move for judgment in their favor upon the following grounds. First of all, we adopt all of the grounds urged by the plaintiff in the case. I think they have already indicated there will be special findings in the case. We repeat our request—I think it has already been made.

The following grounds are also made now, that the Court has no jurisdiction of the subject matter of the cross complaint or of the persons of the cross defendants, as two of the cross defendants were and are residents of the State of California and were such at the time of the commencement of this action, and were at the time the cross complaint was filed, and have been ever since, and that the lack of jurisdiction has not been cured by the dismissal of the two cross defendants.

Next, that it has not been proved that the plaintiff abandoned the contract or refused to continue to perform the contract. [2152]

The allegations of paragraph IX of the cross complaint regarding alleged items of damage have not been proved.

Likewise, with regard to paragraphs X and XIII and other paragraphs in which damages are claimed, the allegations regarding damages have not been proved.

That it has not been proved, as alleged in the cross complaint, that the plaintiff was in default in the completion of its work for a period of twenty days, or for any time.

Next, that the alleged ground of granting liquidated damages of \$500 for each and every working day that may elapse between the limiting date provided in the contract and the date of the actual completion does not apply to the cross defendant surety companies, nor does it apply to plaintiff.

That in this case there is no justification for liquidated damages.

That the testimony adduced shows that the Court cannot indulge in any presumption of damage, that it has not been shown in what particular if any the cross complainant was damaged by the alleged delay, and there has been no evidence to show legal damage to the cross complainant.

There has been a material breach in the contract on behalf of the cross complainant in that it did not comply with the provisions of Article V of the contract between the plaintiff in this case and cross complainant. That there was a breach of such portion of the contract by said cross complainant in that upon the alleged abandonment of the work by the plaintiff the cross complainant had the work

completed by a number of contractors and did not proceed as in Article V of the contract provided, which among other things, required the completion of the work, not by such contracts, but directly by the cross complainant and by labor employed by it.

That it was provided in the contract between the plaintiff and [2153] cross complainant, in the latter portion of Article V of the contract, that in case the expense specified for completing the work is less than the sum that would have been payable under the contract, if the same had been completed by the plaintiff, the plaintiff would be entitled to receive the difference, and in case such expense shall exceed the last said amount, then the plaintiff or its bondsmen shall pay the amount of such excess to the cross complainant on notice from the cross complainant of the excess so due.

The cross defendant surety companies state that the alleged expense was not determined in the manner provided in the contract, nor was it audited in the manner provided in the specifications, and the cross defendants were never notified by the cross complainant of the excess or any sum due or claimed to be due; in that behalf that the conditions of the contract so specified were not performed by the cross complainant.

That the contract between the plaintiff and cross complainant was rescinded by the plaintiff for good and sufficient reasons upon the ground that plaintiff was entitled to extensions of time pur-

suant to the terms of the contract between plaintiff and cross complainant.

That at the time of the filing of the cross complaint the cross complainant did not have a cause of action against the cross complainant surety companies upon the bond, as at that time the expense of completion of the contract had not been determined as in Article V of the contract provided, nor did the cross complainant give notice to the cross defendant surety companies of the amount of such expense as provided in Article V of the contract, and Section 6(Q), subsections 1, 2 and 3 of the specifications.

That at the time the cross complaint was filed the expenses had not been calculated over the District Engineer's final estimate as provided in Section 6(Q), subsections 1, 2 and 3 of the specifications [2154] and Article V of the contract.

The Court: We will take a recess now until two o'clock.

(A recess was here taken until two o'clock p. m.)

[2155]

Afternoon Session

Mr. Alexander: Continuing, your Honor, with our motion for a judgment, the next ground is that the cross complainant violated the provisions of its contract with the plaintiff by completing the contract in a manner contrary to and in violation of the terms, conditions and provisions of the contract,

and thereby released the cross defendant surety companies from any and all liability to defendant and cross complainant. In furtherance of the same ground, that the contract was not completed in accordance with Article V. of the contract.

Next ground, that in and by the plans and specifications and the geological report it was represented by cross complainant to plaintiff that the tunnels described therein could be driven through ground which was self-supporting in character, and which could be constructed with the use only of temporary timber supports for the excavation of said tunnels, which would be removed before the installation therein of the concrete lining or permanent structure provided to be built therein under the plans and specifications.

That said representations were untrue in that the entire length of the tunnels to be constructed was in ground which was not self-supporting, and which required permanent timbering or other support until and after the installation therein of the permanent concrete lining or structure thereof, and required all of the support placed therein prior to permanent lining to remain without removal from said tunnels. That by reason of said misrepresentations plaintiff rescinded the contract.

Next ground, that there was a mutual mistake between the plaintiff and cross complainant regarding the nature of the ground to be encountered, and for such reason plaintiff was relieved of any obli-

gation to further perform said contract, and was entitled to and did rescind said contract. [2156]

Next ground, that the contract between plaintiff and cross complainant provided that the District Engineer of cross complainant would give to plaintiff sufficient points and lines to enable plaintiff to construct the project in accordance with said contract. That said Engineer refused to establish said lines and said points, and thereby the contract was breached, and the plaintiff by reason thereof and for other reasons rescinded said contract.

Next ground, that during the performance of the contract plaintiff was unavoidably delayed from performance of said contract by stormy and inclement weather, by a general strike in the San Francisco and Bay region, by orders of the Industrial Accident Commission of the State of California stopping and suspending the work, by reason of the character of the ground encountered, which was totally different from that represented by the contract and geological report, by physical inability to construct the tunnel in the manner contemplated by the contract, by reason of the inadequate and unsafe design of the tunnel, by slides, by cave-ins, by failure of the cross complainant to perform its obligations under the contract, by delays caused by the Engineer of said cross complainant.

Next: That when plaintiff filed with cross complainant requests for extensions of time to which it was entitled they were refused arbitrarily, capriciously and fraudulently, although plaintiff was

entitled to extensions of time; and the Engineer of said cross complainant failed to consider whether plaintiff was entitled to extensions of time, and failed to exercise his judgment as to whether the work was unavoidably delayed, and arbitrarily, capriciously and without basis of any facts or knowledge of the cause of the delays, refused to approve such extensions of time; and said extensions of time were denied without reference to the opinion or judgment of said Engineer. [2157]

Next ground: That cross complainant withheld payments due to plaintiff of large sums of money which should have been paid to plaintiff according to the terms of the contract between plaintiff and cross complainant.

Next ground: That the cross defendant surety companies are not liable for the alleged liquidated damages for alleged delay in completion. Further, that the provisions for liquidated damages do not apply to the case of an abandonment of the contract by the contractor or to the case of rescission.

Next: That under date of June 16, 1936, said cross complainant stated that it would complete the contract in accordance with the provisions of the contract, but that it did not complete the work in accordance with the terms of said contract.

Next: That the cross complainant seeks to recover the reasonable cost of completing to which it is not entitled under the contract and its rights, if any, are governed by Article V of the contract. Furthermore, that the provisions of Article V of

the contract govern, and there is no basis for liquidated damages in a case of this kind.

Finally, by reason of the operation of law, the original contract was made impossible of completion.

On these grounds, we move for judgment for the cross defendants surety companies.

Mr. Wittschen: I take it that all those matters are submitted and need not be argued at this time. Obviously, the Court has passed upon many of them when your Honor ruled that plaintiff had no right to rescind the contract. The other matters that are peculiar to the cross complaint: as to those, your Honor has before you two conflicting motions. Obviously, one or the other cannot stand, either in whole or in part; one takes from the other; and we are [2158] prepared at this time, if your Honor so desires, to argue the points of law that are involved in the cross complaint.

Here follows the arguments of Mr. Wittschen for defendant and cross complainant, the argument of Mr. Marrin for plaintiff, and the argument of Mr. Alexander for the cross defendant surety companies, which arguments have been omitted by stipulation.

During the course of Mr. Alexander's argument the following statements were made by the Court and respective counsel. [2158]

Why? Well, the bond interest, we know they have not sustained any loss on that. The use of the

Tunnel Road. They lost nothing there. The Tunnel Road is still open. They did not pay any rental for it. There was no additional cost to keep it open. Engineering charges. Your Honor will remember from their own testimony the engineering charges were going on before the so-called abandonment, long before. We had evidence that they had Mr. Boggs all the time, they had Mr. Gelston, his assistant engineer, they had Mr. Lippincott long before the so-called abandonment; they had Derleth and they had Van Norman. In other words, things that they have thrown in after the so-called abandonment were items of expense that they had before by their own testimony. All of these gentlemen testified they were serving the district long before June of 1936.

Mr. Tinning: Mr. Alexander, I think for the sake of the record I ought to call to your attention that those exhibits which are placed in evidence do not include any of the expense for the consultants arising out of the difficulties. They are the regular engineering operating cost of the District.

Mr. Alexander: Your Honor, we know they have put those things-[2258] in. We know they have also passed up to your Honor sheets containing claims for items of legal expense.

Mr. Wittschen: We are just telling you we have not.

Mr. Alexander: If you will look at Exhibit 114-X you will see you have put in evidence here items including legal expense.

Mr. Tinning: Mr. Alexander, pardon me for interrupting you, I have stated as a fact that all legal expense subsequent to the controversy between the parties was eliminated from that.

The Court: Does this copy go to the home office?

Mr. Alexander: No; you can pan me all you want.

The Court: Proceed.

Mr. Alexander: I say they have put in, they have dished up in this Court things that certainly you can take cognizance of. Why mention legal expense at all?

The Court: If counsel indicates that there is an item of legal expense there and he says that is in good faith, do you question it?

Mr. Alexander: I do not question his good faith, and I do not think he should question mine.

The Court: Where is that \$114,000? Let us dispose of it.

Mr. Tinning: Prior to the time of this difficulty I had been attorney for the District and I was paid a certain amount per month, and when this trouble started that payment was doubled, I think on the 15th of June, 1936. There is not one dollar in this statement that has been put in as \$114,000, that was not a standard expense of the District before the rescission. In other words, the total is not put in, nor has Mr. Wittschen's employment been put in, it was all eliminated. If counsel now, when they did not ask a single question on cross examination except something about expenses, mean to indicate that we have put in here improper matters, or mat-

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[2159] ters that were in variance with our statement with respect to the experts, etc., which ran into a great deal of money and which has been eliminated, I think he did not understand what this statement was.

Mr. Wittschen: If there is any doubt about it we would like to put Mr. Boggs on the stand and let them cross examine him. Otherwise we want our statement accepted as a fact, that none of the costs of this litigation are reflected in Exhibit X-114. It is just the ordinary cost of continuing the District, the running expense of the District's operations. The cost of the engineers and other items of expense would have dropped the moment the job was finished, because the Counties took over the work.

The Court: If there is any question about it, that it is an incorrect statement, if you wish to call him in the matter—

Mr. Smith: I think I can clarify the matter. Wasn't the exhibit offered solely for the purpose of showing that you had an item of expense and not to prove the figures?

Mr. Wittschen: I wanted to straighten that out as soon as I had an opportunity to talk. I was going to then, but I would like to do it now, because Mr. Boggs is here. That item of \$278 a day, the cost of keeping the District, is put in for a two-fold purpose. It was put in first to show that there was that actual expenditure as a fact, and if there is anything in the record to the contrary it

is now withdrawn, because the intent was to put that in as a fact. The other item that we intended to put in as a fact was that there was \$89,000 of bond interest during this time of delay. Those two things were facts, and when added together they total \$500, and they were put in both as factual matters and also to show that the claim for liquidated damages was not unreasonable. The \$419 a day which would be the cost of people using the road because [2260] they had to travel two miles more was simply put in to show the difficulty in ascertaining actual damages; but the other two items, the cost per day of the District and the bond interest, were two elements of fact, and Mr. Marrin in his brief has regarded them as facts and has stated them as facts.

Mr. Marrin: Oh, no, just the reverse. I understood they were offered distinctly for the purpose of showing that the amount of damages was difficult to fix, that they were not offered as facts and as a part of the actual damage.

Mr. Wittschen: You have some basis for that because it was stated in the paragraph along with the other items but now that this case is not closed and the controversy has arisen—we do not need to recall the witness—I state to you now we want them considered over your objection as proof of a fact, and if you want to cross examine on them you may.

Mr. Smith: At the time the evidence went in I happened to be conducting the questioning for the

Six Companies, the plaintiff, and I objected to the testimony and your Honor admitted it subject to a motion to strike.

Mr. Wittschen: That is right.

Mr. Smith: On the same subject, there were three matters involved. There was this exhibit regarding the cost and maintenance of the District, which you called Cost maintenance of the District, I understood. Mr. Tinning was putting in the evidence. There was the Exhibit offered for the purpose of showing the amount of alleged bond interest, which they were paying every day, and then there was miscellaneous testimony, not in exhibit form, of the so-called traffic per day, and capitalized into an imaginary figure up into the stratosphere somewhere, and I objected to all of those three items on the ground they were immaterial, and Mr. Wittschen [2261] said in so many words for the record that they were being offered for the sole purpose of showing the difficulty of showing liquidated damages.

The Court: He so stated now.

Mr. Smith: Yes.

Mr. Wittschen: No, I said that that speculative feature, the cost to the general public, was solely to show the difficulty of ascertaining the liquidated damages. I ask your Honor to consider, and if there is any misunderstanding now is the time to straighten it out, that the proof of \$272.89 a day is not only for that purpose but it is actual proof

of the loss that the District incurred, because the District, in taking care of this work, had to exist a certain time longer than it would have existed and that all that expenditure related to this work and was not just the work of maintaining the District, because the District had nothing else to do, and I want that showing considered, and if they would like to cross examine further, because they misunderstood it, or even if we did say it before, we now correct it, it was a misunderstanding, and we are willing that Mr. Boggs come back. I also want considered as a fact the interest matter, because whether you agree it is an element of damage or not, it is a proven fact that the bonds carried so much interest, and there were so many bonds, and I would like both of those considered as facts.

Mr. Smith: You bound yourself by your own offer. The Court asked you to state the purpose of the testimony, and it admitted it on the basis of your statement of its purpose, and the record is clear on that.

The Court: Just a moment. It is important to both sides in the final determination of this case. If there is any question about the state of the record we will meet that emergency. If you [2262] cannot stipulate to the facts, whatever the facts may be, you will have to call the witness and he may be cross examined. There is no use of trying to apply the law to a state of facts that are questionable at all.

Mr. Wittschen: May we recall Mr. Boggs and re-offer that testimony, not only for the purpose of

proving the difficulty of ascertaining the damage, or, as I put it, to show the reasonableness of the liquidated damages claim, but also as an independent proof of fact, and then if they want to cross examine him they may; if they do not avail themselves of that privilege I take it that our offer stands and the evidence that is in stands. Mr. Boggs—

Mr. Smith: Just a minute. That stipulation would mean nothing in this case. It was stipulated the evidence was closed at the close of the testimony the other day. Mr. Wittschen so stated for the record twice in answer to my question.

Mr. Wittschen: I have a right to withdraw it with the Court's permission.

Mr. Smith: And if it is withdrawn we will assign it as prejudicial error.

Mr. Marrin: Certainly this offer is not within any of the issues of this case. In their cross complaint they allege the \$500 a day and ask for judgment for that amount. They said that it was offered as a justification for \$500 a day. They are bringing it in now on an entirely new matter.

The Court: I can see that the atmosphere is getting thick again. We have gotten along so nicely in this case that I thought we could go along that way. After all I can understand how you could enter into a stipulation in good faith with the hope of saving some time. I do not want to penalize either side in that respect, because it is helpful to the Court. I am concerned about [2263] getting the facts in this case. If there is any question about

it at all, we will adjourn until tomorrow morning at ten o'clock, at which time we will proceed to take testimony in the event you cannot agree, yourselves, on a statement of facts, or whatever it may be.

(An adjournment was here taken until tomorrow, Wednesday, June 8, 1938, at ten o'clock a. m.)

[2264]

Wednesday, June 8, 1938

Mr. Tinning: Your Honor please, since the adjournment last night we have given consideration to the matters that were discussed yesterday and we desire at this time to ask leave to reopen the evidence in this case solely with respect to Exhibit 114-X and the matters therein set forth, particularly with respect to the question of whether there is any charge included in the summarization of the District expenses in this exhibit which includes the cost or expenses of the litigation brought about by the Six Companies' attempted rescission on the 13th of June, 1936. Those charges, we felt, were proper charges against Six Companies for the maintenance of the work, and the additional costs are all in in other exhibits, and this offer was brought about by Mr. Alexander's argument that the exhibit showed, or might be construed to show that it included some of the expense of this litigation.

The Court: I think it would be well to have the matter clear so the arguments may proceed.

Mr. Smith: What is the offer now, Mr. Tinning? I did not quite understand your language.

Mr. Tinning: Simply with respect to the fact that this exhibit, 114-X, only covers items of the ordinary expense of the district and not legal expenses, or any other expenses arising from the litigation, or difficulties that commenced with Six Companies on the 13th of June, 1936.

Mr. Smith: I understood that that was the fact originally.

Mr. Marrin: We don't contend it was, Mr. Tinning.

Mr. Alexander: You misunderstood me.

Mr. Wittschen: Well, you brought in Lippincott's expenses and the others.

The Court: Let him take the stand and clear it up. [2265]

Mr. Smith: Just a minute, your Honor. You don't need to put on any evidence as to that, we will stipulate as to that.

Mr. Marrin: You will stipulate to that, won't you, Mr. Alexander?

Mr. Alexander: Yes. I never questioned it, your Honor. You misunderstood me entirely, gentlemen.

The Court: Well, I followed the statements and the record will disclose the language that was used. I may be in error, but there was an inference here that there were attorneys' fees that they were not re-

sponsible for, and the inference would be that they helped themselves, or tried to, by padding up this Exhibit 114.

Mr. Alexander: Oh, your Honor, I am sorry you had that idea. I did not mean to convey that idea at all. I looked over the record and I believe it will bear out my thought.

The Court: I looked over the record, and I think it ought to be cleared up so there is no question about it, at all.

Mr. Smith: Well, we stipulated to the offer made.

Mr. Marrin: The only question that was brought up was that Mr. Alexander mentioned that there were certain legal fees in there, and I think you concede that is so, but you explained that it was only for the legal fees of running the District.

Mr. Tinning: The same fees that were paid continuously from the time the contract work started, sometime in the spring of 1934.

Mr. Marrin: Surely. That was the only reference Mr. Alexander made to legal fees. I understand that. We are perfectly willing to stipulate that that exhibit does not contain any of those legal expenses or other expenses for the conduct of this litigation, and I understand that that is what you want cleared up.

Mr. Tinning: Yes.

The Court: There are no additional attorneys' fees other than—— [2266]

Mr. Marrin: Other than the ordinary running expenses.

The Court: That were being paid out while Six Companies was on the job.

Mr. Tinning: Gentlemen, this is the situation, to be sure what we are stipulating to: The first page of the exhibit, in the column "Office and legal services," for example, the month of July is a typical month, the first full month where this matter appears, because there was a change in the legal compensation paid me ^{as} attorney for the District; that was enacted by resolution of the Board of Directors, as a matter of fact, on the 15th of June, 1936, after the rescission notice was served. This item of \$1,178, which is accounted for here, includes the attorney fees, or salary, it would be better to call it a salary, because it was a fixed sum; the salary of the comptroller of the district; the salary of the two stenographers of the district who had been employed by the District continuously for two or three years precedent, and includes the salary of Mrs. Veale, who has charge of the records and accounts, and who has been continuously employed for several years. Those are the only items, and, of course, this was offered under a general understanding we would offer a summary instead of bringing in the original books, and if it will be stipulated along those lines I have indicated there is no reason for putting on that testimony, but I certainly understood from the argument that was made, although I have not seen the record, that

Mr. Alexander was at least intimating that this contained expenses of attorneys' compensation with respect to this litigation, and I understood him with respect to the consultants. Those would not appear, as I stated in the offer of the other matters, to have any place in this case. In fact, it was necessary for us to rewrite this whole thing, because our auditor, in making up the exhibit, included those matters in the [2267] rest of the expenses of the District, and over the Memorial Day holiday we had to get this whole thing worked out again, because it was a mistake.

If it be understood that is the fact I don't desire to offer evidence, but I don't want to be met in some other court or somewhere else by intimations that this exhibit is anything but what we offered it for, and we offer it sincerely on that basis, and in view of the general understanding outside of the court-room we would not produce the original books, because we all desired saving incumbering the record.

Mr. Smith: That is satisfactory.

Mr. Marrin: Yes, that is our understanding. The understanding is, Mr. Tinning, that this Exhibit 114-X—

The Court: Pardon me. So there is no commitment on your part, or anything, there are only half a dozen items in that, let him take the stand and limit it to those items, so then you will be free—

Mr. Smith: Well, your Honor, the evidence in the case has been closed.

The Court: However, it is immaterial to me.

Mr. Smith: The stipulation is the equivalent of evidence.

The Court: I understand that, but on account of your stipulation, and you don't want to make commitments, that is all I wished.

Mr. Marrin: We are perfectly willing to stipulate that the exhibit X-114 does not contain any of the additional expenses of the District in connection with this litigation. I understand that is the only purpose of it.

Mr. Wittschen: Only in connection with completing the tunnel, the maintenance of the District during that period.

Mr. Marrin: The ordinary running expenses of the District. [2268]

Mr. Wittschen: Yes.

Mr. Marrin: We would not stipulate it was incurred in connection with completing the tunnel.

Mr. Tinning: It was on the ordinary running expenses.

Mr. Smith: Yes, we so understand. We understand it.

Mr. Tinning: That is also your understanding, Mr. Alexander?

Mr. Alexander: It was always my understanding. I never have suggested, or meant to suggest, that the legal expense includes an expense for this case, and it should be so understood. You misunderstood me.

Mr. Tinning: Is it stipulated now that these items set up in Exhibit 114 are for salary and for the items of expense of operating the District, and do not contain any items with respect to this litigation, either for attorneys' fees or consultants?

Mr. Smith: Your last statement is a satisfactory stipulation for that.

Mr. Alexander: We accept it, also.

Mr. Smith: Very well.

The Court: Now that the difficulty is over, you may proceed, gentlemen.

Mr. Alexander: Will your Honor give me just a moment to make a note of that stipulation?

The remainder of Mr. Alexander's argument and Mr. Wittschen's argument in reply have been omitted by stipulation.

At the conclusion of Mr. Wittschen's argument (which has been omitted by stipulation) the following took place: [2269]

The Court: What is the amount of your judgment you are seeking?

Mr. Wittschen: \$383,000. I can give it to your Honor accurately.

The Court: There is some confusion as to that \$278 a day.

Mr. Wittschen: That \$278 a day should not be confused, your Honor. That was given for the purpose of showing that the cost of running the District was that much, but obviously if we get the penalty of \$500 a day liquidated damages we could

not get that. I might say that the interest on the investment and that cost together exceeds \$500 a day. I am merely arguing as to those matters to show that the penalty of \$500 a day is reasonable, but if your [2309] Honor gives us the penalty those matters cannot be considered. We cannot have both. We are limited by the penalty of \$500 a day.

The Court: What is the definite figure?

Mr. Wittschen: I will give it to your Honor, it is \$383,568.16. If your Honor would like me to give the items, they are, the extra cost of completing the work is \$108,066.31.

The Court: That is cost for completion?

Mr. Wittschen: That is cost for completion over and above all credits, what we actually paid to other contractors. Then the protecting of the work and the insurance, and re-advertising is \$69,001.85. Then we have for delay 413 days at \$500 a day, \$206,500, and the three together added up amount to \$383,568.16. Those are all pleaded in the cross complaint.

Mr. Smith: We would like to renew the motion to strike that we made upon which your Honor has not ruled.

The Court: Have you a memorandum of it?

Mr. Smith: It is in the record. The motion was read into the record and appears at page 1707. I can repeat it, it will only take a minute.

The Court: Very well.

Mr. Smith: "Plaintiff and cross defendant moves to strike from the record in the case the evi-

dence given and offered through the witness Wallace B. Boggs concerning

“(a) Cost of employing engineers, office force, watchmen, and procuring materials and supplies for operation of the District after June 13, 1936;

“(b) Cost or expense to the District for interest on its outstanding bond issue during any period after June 13, 1936;

“(c) Amount of traffic over the so-called Tunnel Road, or evidence concerning alleged damage to public from non-completion of the project of the District on or before May 24, 1936. [2310]

“The evidence so objected to commences at approximately line 7 on page 1671 of the transcript, beginning with the question: ‘During the period following the 24th day of May, 1936, did the District continue to employ engineers, etc.?’ and continues down to and including the question: ‘Under the direction and control of what department—was it the Department of Public Works of the State of California?’ on page 1682 of the transcript; and this motion is directed to all thereof beginning at the page and place noted and ending at the page and place noted.

“Also, to supplement what I have written out, the motion is likewise directed to the testimony adduced here this morning along the same lines, concerning the same subjects which

I have mentioned, and, of course, I am not able to give a page number of the record because we have not yet been furnished with the typewritten record; but this motion is directed to the evidence which I specifically pointed out, as well as to what has been received this morning through the witness Boggs on the same subjects.

"The evidence objected to and admitted subject to motion of plaintiff and cross defendant to strike same is now moved to be stricken out upon the grounds that same is not proof in any manner of damage caused to cross-complainant by cross defendant; also that the elements of damage sought to be established thereby are too remote and too speculative and not within the 'purview or rules of damages covering this subject; further, that, had it not been for the breach of the contract by the cross complainant in improperly deducting penalties against the cross defendant, all of the work would have been completed not later than January 3, 1937, which would have been the latest possible date when it would have been necessary for any of the elements covered by this evidence to have continued further, that no matter whether cross complainant was engaged in [2311] constructing its project or not it was liable for payments of its bond interest; that no revenue was derived by cross complainant from the tunnels or project, and therefore no

damage could have possibly been sustained by any delay in completion of same by Joint Highway District or by the public; that the evidence concerning the use of the highways by the public is purely speculative and guesswork, and has nothing to do with any issues involved in this case; further, for the reasons stated by me, the evidence is incompetent, irrelevant and immaterial, and should be stricken from this case."

We renew that motion.

Mr. Alexander: We join, your Honor, in the renewal of the motion to strike out on the same grounds.

Mr. Wittschen: The evidence as to the loss of the use of it by the public was not put in to get a money judgment for the same. It was simply to show the inconvenience of the public and as showing the impossibility of the claim at the time the contract was entered into of proving actual damages, and to sustain liquidated damages. The other matter, as to bond interest, that is a definite sum. That is purely a matter of mathematics. It is there for what it is worth. There is nothing vague or indefinite about that, it is a certain sum.

Mr. Smith: We will submit the matter.

Mr. Wittschen: We will submit it.

The Court: The case stands submitted on both sides.

[2312]

[Endorsed]: No. 9113. United States Circuit Court of Appeals for the Ninth Circuit. Six Companies of California, a corporation, and Hartford Accident and Indemnity Company, a corporation, Fidelity and Deposit Company of Maryland, a corporation, The Aetna Casualty and Surety Company, a corporation, Indemnity Insurance Company of North America, a corporation, American Surety Company of New York, a corporation, Maryland Casualty Company, a corporation, United States Fidelity and Guaranty Company, a corporation, The Fidelity and Casualty Company of New York, a corporation, Glenn Falls Indemnity Company, a corporation, Standard Surety and Casualty Company of New York, a corporation, Standard Accident Insurance Company, a corporation, Massachusetts Bonding and Insurance Company, a corporation, Continental Casualty Company, a corporation, and New Amsterdam Casualty Company, a corporation, Appellants, vs. Joint Highway District No. 13 of the State of California, a public corporation, Appellee. Transcript of Record upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed February 21, 1939.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.